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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1932.

No. 128.

WABASH VALLEY ELECTRIC COMPANY - Appellant,

v.

RALPH M. YOUNG, JOHN W. McCARDLE, HOWELL ELLIS, JERE WEST, HARRY K. CUTHBERTSON, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF INDIANA; JAMES M. OGDEN, AS ATTORNEY GENERAL OF INDIANA; HARRY G. LESLIE, AS GOVERNOR OF INDIANA, AND CITY OF MARTINSVILLE, - - - - - - - - - Appellees.

APPELLEES' BRIEF.

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Solicitors for Appellees.

Wm. B. Burford Printing Co., Indianapolis

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BRIEF FOR ALL APPELLEES.

I.

OPINION OF COURT BELOW.

There is an unreported opinion in this case by the court below, but which appears in the record (R. 142).

II.

JURISDICTION TO REVIEW DECREE.

Appellees believe a valid basis on which this court has jurisdiction to review on appeal the decree below appears in the statement filed by appellant under paragraph 1 of Rule 12.

III.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court of the United States for the Southern District of Indiana, composed of three judges under Section 266 of the Judicial Code, dismissing for want of equity appellant's bill of complaint in which it was sought to have enjoined an order of the Public Service Commission of Indiana which prescribed a reduced schedule of rates for electric service rendered by appellant to consumers in the city of Martinsville, Indiana, upon the ground that the order confiscated appellant's property without due process in violation of the Fourteenth Amendment.

Appellant's brief fails to state much that is material to the consideration of the questions presented, and some of the statements made are erroneous. Supplemental and corrected statements will follow:

Problem Involved.

There was presented to the Commission the new problem of how, upon application from a single municipality, to determine reasonable electric rates applicable only in that municipality when it and many score other and widely

scattered municipalities and communities are served by a far-flung empire of interconnected electric properties, which are in reality singly owned and actually singly managed and operated and where the current used is manufactured at distant, large and modern generating plants and is transmitted over a vast, interconnected system of transmission lines onto local distribution systems for distribution to local consumers. The development in the art, from generation of current in small local generating plants for local distribution to the new method of generating current in distant, large, modern generating plants and transmitting it to communities for local distribution, has created this new problem in electric rate making.

Appellant's property not single physical and economic system.

At the outset, appellees correct the error of fact appearing at page 5 of appellant's brief under "Property involved," where it is said that "Appellant's electrical property is a single physical and economic system." It is far from that. The special findings of fact by the court, the Master's report, and the uncontradicted evidence all show that appellant is a mere corporate fiction in the ownership of the property involved, and that the property to which appellant holds the title consists, (a) of numerous local distribution systems in about fifty distinct and widely scattered communities, one of which is Martinsville, and in rural territory in thirteen separate counties, together with, (b) power system property consisting mainly of a net-work of transmission lines,

transformers and substations forming but an integrated parcel of a far vaster net-work of similar power system property which likewise serves numerous widely scattered municipalities and communities in Indiana; that the whole affiliated system is in reality singly owned and actually singly managed and operated, and the whole of which in turn is further interconnected with other vast net-works of power system properties owned and controlled by the same Insull interests. The foregoing facts will appear in more detail with their record references in the exposition of the facts found by the court and the Master and of the evidence, all as hereinafter set out.

Case concerns only rates fixed for service in Martinsville.

The proceeding before the Public Service Commission of Indiana in which the order complained of resulted invoked the jurisdiction of the Commission only in respect of the electric rates to be charged in Martinsville. The original petition was by seventeen of appellant's customers residing in that city, and the petition asked only for a reduction in electric and gas rates in Martinsville (R. 17). Appellant filed a reduced schedule of gas rates, which the Commission approved, and by stipulation of the parties the gas rates were eliminated from the inquiry (R. 27).

On motion by respondent (appellant) that the petitioners be required to state what rates, tolls, charges, schedules, joint rate or rates, in which petitioners "are directly interested" are in any respect unreasonable or unjustly discriminatory (R. 18), the petitioners, with the City of Martinsville joining, filed an amended petition with the Commission. This amended petition sought only

an investigation of electric rates applicable in Martinsville upon the allegation that the rates which appellant was charging its consumers in that city are unreasonable and excessive in that the rates produce a gross income or net revenue which provides more than an adequate return on "the fair value of the property of respondent devoted to the use of the public in the City of Martinsville" (R. 19). The inquiry before the Commission proceeded on the amended petition. No effort was made by either side to bring rates applicable elsewhere in review for possible adjustment. The inquiry and the resulting schedule of rates were limited to rates chargeable in Martinsville.

How the new rates were determined by the Commission.

The Commission treated the local distribution property located at Martinsville as a unit of property that is devoted exclusively to the use of the public within the unit of territory embraced by the territorial boundaries of the city, and fixed a fair value for that unit of property. The evidence of value "fell into form" (R. 28) as of about November 30, 1927, and the Commission found that the fair value of this local unit of property on that date was $87,000 (R. 45). Next, the Commission made a determination of what would be a fair "gateway" charge at Martinsville for the energy, there furnished by appellant for distribution in the city, and found that $.0172 per K. W. H., covering "production cost, depreciation and return" on the power system property would be a fair "gateway" charge (R. 43-47). The Commission used 7% on the fair value of appellant's property for rate of return (R. 46), and 4% for annual depreciation (R. 52). The "gateway" energy charge of $.0172 per K. W. H.

for the energy used for service in Martinsville then became an item of local operating expense. The Commission then finds that the rates fixed by it will be adequate to meet the requirements of the Company for rendering service to Martinsville and to yield a 7% return on the fair value of the Company's property (R. 46).

The Commission's order does not find a fair value for appellant's power system property. How it arrived at the "gateway" charge of $.0172 as sufficient to include annual depreciation and fair return on power system property is not entirely clear. The order shows how as much as $.0139 of the $.0172 charge was reached (R. 43-45). The difference of $.0033 per K. W. H. was added by the Commission to cover depreciation and return on power system property.

Rates found sufficient.

The court below, and the Master, found that the rates fixed by the Commission are sufficient to yield a fair return on the fair value of appellant's property to the extent that it is devoted to the use of the public in Martinsville. If the Commission was mistaken on the items of working capital and annual depreciation, as appellant's brief contends, no such mistake was made by the court below or by the Master in their tests of these rates.

Due to the considerable difference in the effective date of the order and the hearing date of the case, the court and the Master found property values at February 1, 1929, and at May 1, 1930, and found the other factors necessary to proper tests of the adequacy of these rates applied to the calendar year of 1929, and to the twelve month period ending on May 31, 1930.

The method of test used by the court was to compute the Martinsville revenue requirements for a 7% yield on a rate base constituted by the fair value of the local property at Martinsville plus a fair allocable portion of the fair value of appellant's power system property, and then test the operating revenues which the new rates would produce, if in force, by those requirements.

The result of this test applied to the twelve month period ending May 31, 1930, is that the new rates would have yielded a 10% return on the May 1, 1930, rate base; and applied to the calendar year of 1929, these rates would have yielded a 11% return on the May 1, 1930, rate base, and an even greater return on the February 1, 1929, rate base (R. 168, 169, Finding 15).

This same test for those two periods showing the same results, but with more detail, appear in Findings XL and XLI of the Master's report (R. 123-124).

The Master also tested out these rates by the method which the Commission used for determining the rates. He found that a "gateway" charge of $.018 per K. W. H. would be fair (R. 128). In his report, the Master then tested out the adequacy of the new rates by computing the power cost at Martinsville under said "gateway" charge of $.018 per K. W. H. The result of this test applied to the calendar year 1929 shows that the new rates would have yielded more than 7% on the May 1, 1930, fair value found by the Master, and later by the court, for the local property at Martinsville; and applied to the twelve month period ending May 31, 1930, this same test shows a return of more than 7% for that period (R. 128-130).

The Court's special findings of fact.

The court's special findings of fact (R. 156-169) state the facts material to a proper consideration of the questions presented about as concisely as they could here be epitomized, and we therefore set them out, beginning with the second finding, as follows:

2. The City of Martinsville is located in the County of Morgan in said State, and has approximately five thousand inhabitants. There are few industries in said city that consume large amounts of electricity. A great portion of the electricity there used is for domestic purposes. For a number of years electricity was supplied in said city by a local generating and distributing plant, which was later purchased by plaintiff and is now owned by it.

3. The plaintiff is one of seven affiliated corporations giving electric service to the public in Indiana, and whose combined outstanding capital stocks and securities are owned by a corporation known as Central Indiana Power Company. The other six of said affiliated public utility corporations are Indiana Electric Corporation, Attica Electric Company, Northern Indiana Power Company, Colfax Electric Company, Moran Electric Light and Power Company, and Mulberry Light and Power Company.

The same persons who are officers and directors of plaintiff corporation also occupy the corresponding positions in the other six of the affiliated corporations. The operation of this affiliated group is in charge of a committee consisting of representatives of each of the corporations.

4. At some time prior to 1924, and in keeping with the

progress of the times in the electric industry, the financial interests in control of said affiliated group conceived the plan of constructing a large modern generating plant at Dresser, Indiana, for the manufacture of current at a minimum cost and of distributing the current so manufactured throughout large areas of territory in said State. The said group of corporate structures was formed to facilitate said plan.

The financing of such generating plant required the assemblage of a group of electric properties throughout a large part of said State, in order that there might be guaranteed the disposal of a sufficient amount of electricity each year to justify the construction of a generating plant of that type.

In pursuance to this plan a large generating plant, known as the "Dresser Plant" was constructed on the Wabash River, near the City of Terre Haute in Vigo County of said State by Indiana Electric Corporation, one of said affiliated companies. This plant has a generating capacity of 300,000,000 K. W. H. per year, and has been in operation since 1924. Existing electric utility properties were severally acquired by the affiliated corporations in forty counties in said State. Transmission lines and other power system equipment were constructed, interconnecting the acquired electric properties with each other and with the Dresser Plant in order to assure economical operating. A pool of electricity was thus provided and made available for the needs of each of the affiliated corporations. Power loops were constructed throughout the affiliated system of properties so that current could be fed in either direction in event of disablement of a section of transmission line.

The combined needs of the affiliated companies for current have increased so that for the twelve month period ending May 31, 1930, the combined total of current used was between 475,000,000 and 500,000,000 K. W. H. To meet this increased demand the affiliated system has been interconnected with several other large generating plants located in Indiana, some of which are controlled by the same financial interests that control said affiliated group. Indiana Electric Corporation has also constructed a 132 K. V. line across said State to the "Columbia Plant" of Columbia Power Company in Ohio near Cincinnati, over which line current manufactured at the Columbia plant is made available to said affiliated system.

This affiliated system of properties was planned, constructed and interconnected and is being operated by said common management as one large system, although each of said affiliated companies owns distinct property, keeps separate accounts and is operated as a distinct public utility.

5. For the furtherance of said plan, plaintiff, Wabash Valley Electric Company, purchased the local electric plant at Martinsville, also the local electric plants at Sullivan and Clinton and at many other widely scattered cities and towns located in central and western Indiana in the counties of Morgan, Putnam, Owen, Sullivan, Greene, Clay, Vigo, Parke, Vermillion, Fountain, Montgomery, Warren and Tippecanoe.

These local plants were interconnected by high tension transmission lines which in turn were interconnected with similar lines of other affiliated companies in the affiliated system. Substations and transformers were constructed

for the purpose of feeding current from plaintiff's power system onto its local distribution properties in the various cities, towns and communities where it furnishes electric service.

After plaintiff acquired such local plants it ceased to operate such local generating plants except occasionally in event of system peak demand. It now owns three small local generating plants located at Martinsville, Sullivan and Clinton. The electricity generated by these local plants is not fed directly onto the local distribution systems in said cities, but it flows into the affiliated system power pool.

The greater part of the Indiana coal fields lie within the counties in which plaintiff furnishes electric service. At the time when plaintiff began its operations in these counties the coal mines were being operated extensively, requiring a great amount of current for such operation. Since then many coal mines have ceased or curtailed operation, and the use of electricity in this industry has materially decreased. At the time plaintiff began its operations in these counties practically all of the municipalities therein were being supplied with electricity by local plants, there being no interconnecting transmission lines, and such plants were owned either by the municipalities themselves or by private corporations. This practice has gradually been abandoned, and most of these municipalities are now being supplied electricity by plaintiff. Plaintiff furnishes electric service to approximately 18,000 individual customers in approximately fifty cities, towns and communities and in rural territory, including the City of Martinsville.

Plaintiff is the only utility furnishing electric service to the inhabitants at Martinsville, and it operates there under an indeterminate permit from the State of Indiana and under the terms and provisions of the Shively-Spencer Utility Commission Act of said State. The electricity that is distributed in Martinsville is fed onto plaintiff's local distribution system from its said power system property. The current so used comes principally from said Dresser plant.

Plaintiff also owns and operates a gas plant at Martinsville, but no question of gas rates is here involved.

6. On the 16th day of March, 1927, and while plaintiff was furnishing electric service at Martinsville in the manner described, seventeen citizens of Martinsville, who were electric patrons of plaintiff, filed with defendant Commission a petition seeking a reduction in electric rates at Martinsville. An amended petition was thereafter filed in which the City of Martinsville joined as a petitioner. At said time, and at all times prior thereto while plaintiff was furnishing electric service in Martinsville, the plaintiff had on file with said Commission a schedule of rates for electric service at said city approved by said Commission, and which schedule was applicable only at Martinsville.

At all times herein mentioned there was, and now is, in force section fifty-seven of said Act, and which is as follows:

> Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by ten persons, firms, corpora-

tions or associations, or ten complainants of all or any of the aforementioned classes, or by any public utility, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act, complained of, shall be entered by the commission without a formal public hearing.

Hearings were had on said amended petition at various times by said Commission, and a final order was entered on the 26th day of January, 1929, effective as of February 1st following, fixing the rates and charges for electric service to be collected by plaintiff from its customers in Martinsville, and which are here complained of.

7. Pending said proceeding before the Commission, plaintiff offered to file and put in effect at Martinsville a trial schedule of optional electric rates. That schedule was approved by the Commission for that purpose on July 9, 1927, and said schedule has been in force at Martinsville since then. Plaintiff's operating revenues from Martins-

ville electric business have not been reduced under said trial schedule. Its operating revenues from electric rates at Martinsville for the last full calendar year (1926) preceding operation under said trial schedule were $94,238.23. For the first full calendar year (1928) under the trial schedule the corresponding operating revenues were $94,990.13; and for 1929 they were $99,550.91.

Said trial schedule of rates is, on the whole, higher than the schedule of rates complained of. If the rates complained of had been in effect during the entire year of 1929 they would, by their application to consumer data, have yielded an operating revenue of $84,750.13 for that year. Likewise, they would have yielded an operating revenue of $81,868.72 for the twelve month period ending May 31, 1930.

8. The property of plaintiff that is used and useful for furnishing electric service at Martinsville consists of its local distribution system located in Martinsville, together with an apportionable part of its said interconnected power system property located outside of the corporate limits of Martinsville. Said power system property is used and useful for furnishing services elsewhere in common with the service furnished by means of it at Martinsville.

Plaintiff's local distribution properties located in cities, towns and communities other than Martinsville are not used or useful for furnishing service in Martinsville.

9. Plaintiff's local electric property in Martinsville had undergone such rehabilitation by the time when preparation was being made for the trial of this suit that the inventory used in appraisals introduced before the Commis-

sion was no longer reliable. By joint effort of the engineers representing the adverse parties a new inventory of said local property was made as of May 1, 1930. New appraisals as of that date were made on the basis of the new inventory and introduced in evidence. They were the only appraisals of said local property that were introduced in evidence.

The cost to reproduce new said local electric property in Martinsville, and such cost less accrued depreciation, as of May 1, 1930, is as follows:

	Cost of Reproduction	Cost of Reproduction Depreciated
Poles, towers and fixtures	$20,670	$16,532
Overhead conductors	12,928	11,636
Services	4,963	3,970
Line transformers	13,920	11,832
Transformer installation	1,879	1,597
Consumers' meters	14,977	12,713
Meter installation	767	652
Office equipment	2,699	2,159
Shop equipment	515	412
Transportation equipment	1,516	970
Laboratory equipment	564	479
Total land, plant and equipment.	$75,398	$62,952
To which should be added the following:		
General contingencies and general overhead	10,964	10,701
Structures and equipment at generat-		

ing plant at Martinsville devoted only to local use in Martinsville...	12,475	10,936
Working cash		3,358
Materials and supplies.....		6,500
Going concern value.....		8,500
Total		$102,947

Said local property was substantially in the same condition and of the same fair value on February 1, 1929, as on May 1, 1930. The fair value of plaintiff's used and useful local electric property in Martinsville was $102,947 on both of said dates, and the fair value of the physical elements of said local property on those respective dates was $84,589.

10. The cost to reproduce new plaintiff's said power system property, and such cost less accrued depreciation, as of May 1, 1930, is as follows:

	Cost of Reproduction Not depreciated	Cost of Reproduction Depreciated
Generating plants	$ 516,600	$ 309,388
High voltage stations	482,467	433,609
High voltage transmissions....	986,309	892,877
Carrier current telephone	37,253	31,984
Low voltage substations	14,289	11,423
Low voltage transmission	101,083	66,249
Total land, labor and equipment	$2,138,001	$1,765,530

To which should be added:

Undistributed construction costs, 15%	320,700	264,800
	$2,458,701	$2,030,330
Capital additions, September 1, 1927, to May 1, 1930.....	539,065	539,065
To which should be added:		
Working cash		80,000
Fuel stock		5,000
Material and supplies		162,000
Going concern value		250,000
	$2,997,766	$3,066,395

There were no appraisals of the power system property as of February 1, 1929, placed in evidence. The net additions to said power system property between February 1, 1929, and May 1, 1930, aggregated $444,565.

The fair value of plaintiff's power system property on May 1, 1930, was $3,066,395, and the fair value of the physical elements thereof on that date was $2,569,395. As of February 1, 1929, the fair value of said power system property was $2,621,830, and the fair value of the physical elements thereof on that date was $2,124,830.

11. No cost of financing the reproduction of any of said property would be incurred. Central Indiana Power Company has in the past, and would have on the reproduction dates in question, taken all of the securities issued by plaintiff and furnished it with the necessary capital without any financing cost to plaintiff.

There is no upward trend in prices affecting the value of said properties. There has been a substantial down-

ward trend in copper prices since May 1, 1930, which would tend to reduce the values found herein.

12. The facts concerning the uses to which plaintiff's power system property is devoted under operation by said common management of the affiliated group, and which are relevant to an apportionment of the fair value of the power system property to Martinsville use, are as follows:

Plaintiff's power system property is located in a group of contiguous counties forming an intervening territory between the territory to the southwest where Indiana Electric Corporation's Dresser plant and radiating transmission lines are located and the territory to the north and east where the transmission lines and other property of the other affiliated companies are located.

There is annually nearly twice as much current transmitted onto plaintiff's transmission lines from the transmission lines of Indiana Electric Corporation as is required to satisfy the demands of plaintiff's individual customers in its own territory. The excess of this current is transmitted over plaintiff's high tension lines and is delivered principally onto similar lines of Attica Electric Company at Attica and Northern Indiana Power Company at Lafayette for distribution by those companies to their customers in their respective territories. This excess current is so transmitted over plaintiff's lines over a distance of approximately ninety miles. The amount of current manufactured annually at plaintiff's three small generating plants since 1927 has been less than one-fourth of one per cent of the total quantity of current handled on plaintiff's power system property.

In 1929 a total of 84,260,392 K. W. H. was handled on

plaintiff's power system property, and only 123,470 K. W. H. were manufactured by plaintiff. Of this total, 2,532,798 K. W. H. were delivered at the Martinsville substation onto the local distribution system in Martinsville for local distribution, 6,014,822 K. W. H. were delivered at the Attica substation onto the lines of Attica Electric Corporation for distribution to its customers, 30,239,200 K. W. H. were delivered at the Lafayette substation onto the lines of Northern Indiana Power Company for distribution to its customers, 1,364,942 K. W. H. were delivered onto the lines of Indiana Electric Corporation, and the balance was delivered at plaintiff's other substations for local distribution by it and part was lost in transmission and transformation. In the twelve month period ending May 31, 1930, the total amount of current handled on plaintiff's lines was 85,295,839 K. W. H., only 77,945 K. W. H. of which were manufactured by plaintiff. Of this total, 2,528,511 K. W. H. was delivered at the Martinsville substation, and the remainder was disposed of substantially in the same manner as for the year 1929.

The principal source of this current is the Dresser plant. In 1929 plaintiff received 79,962,702 K. W. H. from Indiana Electric Corporation and for the twelve month period ending May 31, 1930, the amount received from the same source was 84,778,437 K. W. H. A small amount of current is interchanged by plaintiff with Indiana Electric Corporation and with Northern Indiana Power Company. For example, during the twelve month period ending May 31, 1930, 1,585,400 K. W. H. were delivered from the lines of Northern Indiana Power Company onto plaintiff's lines. Similarly, other interchanges of current are made between

said affiliated corporations. Monthly settlements are made between the affiliated corporations on net balances of current received at the rate of one cent per K. W. H.

Plaintiff is charged at the rate of one cent per K. W. H. for all current received by it from Indiana Electric Corporation. Prior to December 1, 1929, plaintiff was credited at the rate of one and a quarter cent per K. W. H. for the current delivered from its lines at Attica and Lafayette onto the lines of its affiliated companies. Since that date, plaintiff is credited at the same rate it is charged, viz.: one cent per K. W. H. for the current actually delivered from its lines onto the lines of its affiliated companies, and the line and transformation losses incident to handling such excess current fall upon plaintiff.

Plaintiff can at all times obtain from Indiana Electric Corporation all current needed by it to supply its customers in its own territory. It is not necessary to the giving of adequate service by plaintiff that it receive any current from Attica Electric Corporation or Northern Indiana Power Company, and it has in the past received but little current from those companies. There is no substantial or necessary use of the power system properties of Attica Electric and Northern Indiana Power Companies for furnishing service to plaintiff's customers in reciprocation of the use made of plaintiff's property for furnishing service by those companies to their respective customers. Plaintiff's power system property was planned, constructed and is operated by said common management for the use of the customers of said affiliated companies as well as for the use of plaintiff's customers, and the same is operated as a part of said affiliated system of properties

for the benefit of said affiliated companies as well as for the benefit of plaintiff.

The current delivered at the Martinsville substation comes either over plaintiff's high tension line running to Martinsville from Indiana Electric Corporation's Lenore substation near Indianapolis, or over another of plaintiff's lines running from said corporation's Cloverdale substation to Spencer and Martinsville. Plaintiff's high tension line running from Clinton to Attica and Lafayette, and over which most of said excess current is delivered to affiliated companies, is not necessary for furnishing adequate service at Martinsville.

13. The ratio of substation deliveries at Martinsville to total substation deliveries made by plaintiff in 1929 is 3.34%. In the same year the ratio of actual sales made to customers in Martinsville to plaintiff's total sales, inclusive of the current delivered at Attica and Lafayette, is 3.027%. The ratio of Martinsville peak demand in 1929 to plaintiff's system peak demand in the same year, but occurring on different days in the year, is 3.01%.

There are included in plaintiff's entire power system property, as the same has hereinbefore been appraised and valued, isolated transmission lines also branch lines and substations which are not directly used and useful for transmitting current to Martinsville.

An apportionment of power system property to Martinsville use on the basis of 3.30% of its fair value is reasonable and fair.

That percentage of the February 1, 1929, fair value ($2,621,830) is $86,520.39, and of the May 1, 1930, and subsequent fair value ($3,066,395) it is $101,191.00. These

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The current delivered at the Martinsville substation comes either over plaintiff's high tension line running to Martinsville from Indiana Electric Corporation's Lenore substation near Indianapolis, or over another of plaintiff's lines running from said corporation's Cloverdale substation to Spencer and Martinsville. Plaintiff's high tension line running from Clinton to Attica and Lafayette, and over which most of said excess current is delivered to affiliated companies, is not necessary for furnishing adequate service at Martinsville.

13. The ratio of substation deliveries at Martinsville to total substation deliveries made by plaintiff in 1929 is 3.34%. In the same year the ratio of actual sales made to customers in Martinsville to plaintiff's total sales, inclusive of the current delivered at Attica and Lafayette, is 3.027%. The ratio of Martinsville peak demand in 1929 to plaintiff's system peak demand in the same year, but occurring on different days in the year, is 3.01%.

There are included in plaintiff's entire power system property, as the same has hereinbefore been appraised and valued, isolated transmission lines also branch lines and substations which are not directly used and useful for transmitting current to Martinsville.

An apportionment of power system property to Martinsville use on the basis of 3.30% of its fair value is reasonable and fair.

That percentage of the February 1, 1929, fair value ($2,621,830) is $86,520.39, and of the May 1, 1930, and subsequent fair value ($3,066,395) it is $101,191.00. These

apportioned values together with the fair value of the local property ($102,947.00) constitute the total fair values of plaintiff's electric property used and useful for furnishing service at Martinsville at said respective times. Thus determined, the total fair value at February 1, 1929, was $189,467.39, and at May 1, 1930, and since, it is $204,138.00.

The fair value of the physical elements of said property, similarly determined, at February 1, 1929, (apportioned $70,119.39 and local $84,589) is $154,708.39, and at May 1, 1930, and since it is (apportioned $84,790 and local $84,589) $169,379.00.

14. A return at the rate of 7% per annum on said total fair value is a fair return.

A composite rate of 4% per annum on the fair value of the physical elements of said property is sufficient for the depreciation requirements of said property.

15. The cost of the current delivered in 1929, and since, at the Martinsville substation for local distribution in Martinsville is $.0133 per K. W. H. This cost includes the purchase price of one cent and all other power system expenses, except annual depreciation.

A charge to operating expenses against the revenues from the rates complained of in the amount of $400 per year for ten years, as fixed and allowed by the Commission, is a sufficient allowance to such operating expenses on account of expenses reasonably occasioned by this rate inquiry.

For the twelve month period ending May 31, 1930, the expenses chargeable to such operating expenses and annual depreciation were as follows:

Power—2,528,511 K. W. H. at $.00133	$33,629.20
Other expenses, including taxes	20,624.18
Rate case expense	400.00
Annual depreciation (4% of $169,379.00)	6,775.16
Total	$61,428.54

There would have been available for return for said twelve month period $20,440.00 out of the total operating revenues of $81,868.72 which the rates complained of would have yielded if in force during said period. This would have made a return for that period of slightly more than 10% on said fair value of $204,138.00.

For the calendar year of 1929 the total operating expenses, including annual depreciation, were $62,250.54. There would in that year have been available for return $22,499.59 out of the total operating revenues of $84,750.13 which the rates complained of would have produced if then in force. This would have made a return for 1929 of more than 11% on said fair value of $204,138.00, and would have made an even greater rate of return on the February 1, 1929, fair value of $189,467.399.

16. The rates complained of, if in force at Martinsville, would at all times since February 1, 1929, have produced, and would now produce, sufficient operating revenues to pay all operating expenses, taxes, amortized rate case expenses and annual depreciation chargeable against said revenues, and a fair return of more than 7% per annum on the fair value of plaintiff's electric property to the extent that the same is used or useful for rendering the electric service to which said rates apply.

17. The facts found by the Special Master as they are stated in his report filed herein are true.

The Master's findings.

The Master's findings of fact (R. 73-132) are merged in the court's special findings on the points covered by the court's findings.

The court's findings do not include a finding on what is a fair "gateway" charge under the method the Commission used, but the Master's do, and he also tested the rates under that method. The Master's findings of said "gateway" charge, and his tests of the rates under that method are as follows (R. 127-130):

XLIV.

In 1927 the average cost per K. W. H. actually sold by plaintiff to Martinsville, (substation input) as shown by its own books, was:

(Ex. 111-67)	$.0147
In 1928 it was (Ex. 111-67)	.0134
In 1929 it was (Ex. 107-47)	.0133
Total	$.0414
Or an average of	$.0138

In arriving at the above figures the company took the total substation readings for each month and deducted therefrom current purchased direct, which gave the net power system input; it then took the total Martinsville readings for each month and obtained the percentage of Martinsville readings to the total substation readings;

it then figured total power cost, which included power purchased, steam power generation, transmission expenses, substation expenses, general expenses and taxes, deducted direct purchases and thus arrived at the net apportionable power costs for the whole system. It then applied the percentage of current delivered to Martinsville to the net apportionable power cost, which gave it the proper apportionable power costs to Martinsville.

However, in the above figures nothing is included to take care of depreciation and return: proper allowance should be made for these: I have found and allowed for a depreciation of:

4% on $2,569,395, or.....$102,775.80
and provided for a 7% return on $3,066,395 or. 214,647.65

Total $317,423.45

The cost per K. W. H. to produce and provide for such 4% depreciation and 7% return, based on 75,811,628 K. W. H. for the year 1929, would be $.0042—which, added to the above average for the three years of 1927, 1928 and 1929, would make $.018 per K. W. H. at Martinsville, and which amount I find to be a fair and adequate gateway rate for Martinsville.

XLV.

GATEWAY METHOD APPLIED FOR 1929 USING $.018 PER K. W. H.

If the Gateway Method and the calendar year of 1929 are used as the basis of computation of the proper rate of return herein, I recapitulate and find as follows:

Gross income under rates prescribed by Commission for year 1929.....$84,750.13

EXPENSES.

Power—2,532,790 K. W. H. at $.018	$45,590.21	
Distribution	5,111.28	
Consumption	1,475.80	
Commercial	2,671.10	
New business	3,038.92	
General and miscellaneous (less rate case expense)	9,731.27	
Taxes	2,527.23	
Rate expense	400.00	
Appliance sales—Loss	503.56	
Total	$71,049.37	
Indirect charge to construction—Credit	2,784.60	
	$68,264.77	
Depreciation for Martinsville local	3,383.56	
Total		71,648.33
Leaving a balance for return of		$13,101.80

And which amount is in excess of 7% of what I have hereinbefore found ($102,947) is the fair value of Martinsville Local Property.

XLVI.

GATEWAY METHOD APPLIED FOR YEAR ENDING MAY 31, 1930, USING $.018 PER K. W. H.

If the Gateway Method and the year ending May 31, 1930, are used as the basis for computation herein, I recapitulate and find as follows:

Gross income under rates prescribed by Public Service Commission		$81,868.72

EXPENSES.

Power—2,528,511 K. W. H. at $.018	$45,513.20	
Distribution	5,607.82	
Utilization	1,499.58	
Commercial	2,255.72	
New business	2,590.39	
General and miscellaneous	10,432.88	
Uncollectible accounts	578.06	
Taxes	2,579.98	
Rate expense	400.00	
Total	$71,457.63	
Indirect charges to construction—Credit	4,920.25	
	$66,537.38	
Depreciation for Martinsville local	3,383.56	
		69,920.94
Leaving a balance for return of		$11,987.78

And which amount is in excess of 7% return on what I have hereinbefore found ($102,947) to be the fair value of Martinsville Local Property.

The Master further found that the operating revenues from the rates in question for the calendar year 1929 would have been sufficient to yield a 7% return for that year on the fair value of $102,947 if the power cost at the

"gateway" were computed at $.02021 per K. W. H. (R. 126). In other words, that after allowance were made for a 7% return, 4% annual depreciation, and all other local operating expenses, enough would be left out of the operating revenues so that the power used could be charged at the rate of $.02021 per K. W. H. at the Martinsville gateway, which is a higher rate than the $.018 rate which he found fair.

Corrections of, and supplements to, statements in appellant's brief of the Master's findings.

The statement at page 8 of appellant's brief that the Master found for the rate base the total of $102,947, as the fair value of the Martinsville local property, and $101,191, as an allocated portion of the fair value of appellant's power system is incomplete. The Master did find a rate base so constituted and totaling $204,138 as of May 1, 1930, for the purpose of one method of testing the rates. It is this base that he used in his tests of the rates under what he termed the "Allocation Method" in Findings XL and XLI (R. 123-125). The court found the same rate base and used it in its test of the rates (R. 168). For February 1, 1929, the rate base similarly constituted from the Master's findings is $189,467.39 and was so found by the court (R. 169). The Master's finding of the fair value of the Martinsville local property for February 1, 1929, is $102,947 (R. 96), and of the power system property for the same date it is $2,621,830 (R. 100), 3.30% of which, or $86,520.39, added to the $102,947 makes the $189,467.39. This last figure was not used in the tests made of the rates since they showed a fair return on the larger, May 1, 1930, rate base.

The percentage of 3.3 used by the Master for apportionment to Martinsville of power system value is found by the Master on a wider basis than indicated at page 109 of appellant's brief. The supporting facts on which it rests appear in Finding XXVIII (R. 109), and are (a) the ratio of actual sales of K. W. H. to Martinsville consumers to the total sales (all line and transformation losses eliminated) made by appellant in 1929, which was 3.027%; (b) substation output at Martinsville to total substation output in 1929, which was 3.34%; (c) sales ratio in 1928, which was 3.02%; (d) substation output ratio in 1928, which was 3.38%; (e) Martinsville maximum consumer demand to system maximum consumer demand in 1929, which was 3.01%.

The statement at page 9 of appellant's brief that the Master did not use actual cost of electrical energy is erroneous in respect to his tests of the rates made in his Findings XL and XLI (R. 123, 124) under the "Allocation Method." In those tests the Master used for power cost the figures "as carried on books of company." In those tests the items of annual depreciation and return on power system property devoted to Martinsville use are not reflected in the power cost used, but are computed on the rate base which includes an allocated part of power system value.

In the Master's tests of the rates in Findings XLV and XLVI (R. 128, 129) under the "Gateway Method", the power cost is computed at the $.018 per K. W. H. gateway charge, which charge includes the items of annual depreciation and return on power system value devoted to Martinsville use. The failure in appellant's brief to dis-

tinguish between these differently computed power costs under the "Allocation Method" and the "Gateway Method" of test is what led to the erroneous comparison of power costs at page 93 of the brief. In computing power cost, appellant used the $.022897 per K. W. H. rate which already includes items of 4% for annual depreciation and 8% for return on power system property (R. 300), and the item for depreciation on allocated power system value is again included in its $11,516.60 figure at page 93 of the brief. The court used actual power cost exclusive of depreciation and return on power system property, and then allowed 4% for depreciation and 7% return on the whole rate base which included an allocated portion of power system value.

In respect to appellant's statement at page 9 of its brief that the Master "arbitrarily" excluded all but $4,000 of rate case expense, attention is called to his complete finding on that subject in Finding XXXI (R. 114-116), in which it is found that "no evidence was offered in this case directly on the proposition as to whether the allowance by the Commission was reasonable or unreasonable." And, "the evidence is not sufficient to justify a finding that the Public Service Commission has made any substantial error in its allowance for rate case expense." It will be shown under "Evidence" and under "Argument," post, that the Master did not err in his finding that $50,000 was an exorbitant charge (R. 114) against Martinsville, and should not be charged as operating expenses in whole against revenues from Martinsville in an inquiry of whether the rates fixed are adequate.

The true way in which the "gateway" charge of $.018

was computed by the Master in his Finding XLIV, set out in full above. In this connection, attention is called to the Master's Finding XLII (R. 125, 126) where he computed a "gateway" charge of $.01718 for 1929, on the following basis:

Total power system expense as shown by the company's books	$1,000,551.54
(See exhibit 107, page 36)	
Add substation cost charged direct to Martinsville distribution	3,384.80
	$1,003,936.34
Deduct—Portion of indirect charges to construction	18,242.68
	$ 985,693.66
Depreciation, 4% on $2,569,395 (Finding No. XXXIII)	$ 102,775.80
Return, 7% on $3,066,395	$ 214,647.65
Total of above items.....	$1,303,117.11

Total substation output at "Gateway," 75,811,628 K. W. H.

Cost per K. W. H. on this basis (depreciation and return included) is ($1,303,117.11 ÷ $75,811,628) 1.718 cents or $.01718.

Findings concerning appraisals.

The Master made findings concerning unit prices, depreciation and intangible items in the appraisals introduced in evidence. In Finding XXIII (R. 100) the Master

found that the unit prices used by Abbett in the appraisals of the engineering department of the Commission were well founded and adequate, and that Abbett's deductions from cost new on account of accrued depreciation were based on observation of the property, the wear and tear thereon, its age, present condition, and its probable useful life, and that these deductions were fair and reasonable.

In Finding XIV (R. 87) the Master compared analyses of unit prices used by Abbett and by Spooner and Merrill, and found that those of Spooner and Merrill were higher due to their loading for contingencies and omissions in addition to an overall allowance of 15% for "general overhead expense" which also contemplated contingencies such as Acts of God, storm, weather conditions and unforeseen conditions. The Master found the Spooner and Merrill unit prices were unreasonably high (R. 94).

In Finding XII (R. 85) the Master finds that Stone and Webster were employed to check the Spooner and Merrill appraisal and that they added a further overall percentage on the theory that the Spooner and Merrill unit prices were too low. The Master found the Stone and Webster unit prices too high and the amounts added for "general construction" costs unwarranted. He also found their allowances for organization, working capital, cost of financing and going value to be too high (R. 86).

The court's itemized statement, ante, of the $102,947 fair value found by it for the Martinsville local property is the same as that of the Master in his Finding XIX (R. 94-96). The $62,952 sum in that statement is the aggregate for "land, plant and equipment" as appraised

by the Commission engineers (R. 94). The other items aggregating about $40,000 are predicated as follows: the $10,701 item for "General contingencies and general overhead" is Spooner and Merrill's figure and was adopted in lieu of the Commission engineers' analagous figure (R. 95); the $10,936 item for "Structures x x x for local Martinsville use only" is Spooner and Merrill's figure for an allocable part of the small generating plant at Martinsville, which part they thought should be treated as local property but which the Commission engineers had treated as belonging to power system property (R. 87 and 97); the $3,358 item for "working cash" is Spooner and Merrill's figure (R. 95); the $6,500 item for "materials and supplies," and the $8,500 item for "going value" represent figures found by the Master upon the whole evidence as being in his judgment adequate and fair.

The court's itemized statement, ante, of the $3,066,395 fair value found by it for appellant's power system property is the same as that of the Master in his Finding XXII (R. 99). Here again, the Master used the Commission engineers' figure ($1,765,530—see Exh. 103, R. 308), for the items constituting "land, labor and equipment." The other items aggregating over $1,300,000 were derived from other evidence. The $264,000 item for "undistributed construction costs" is higher than the figure of the Commission engineers (see Exh. 103, R. 308) and is computed on Spooner and Merrill's percentage (15%); the $539,065 item for "Capital addition" is taken from plaintiff's (appellant) Exhibit 4-B (R. 276); the $80,000 item for "working cash," the $5,000 for "fuel stock," the $162,000 for "materials and supplies," and

the $250,000 for "going concern value" represent figures found by the Master upon the whole evidence as being in his judgment adequate and fair.

The Master found that the electric property which appellant contends is used and useful in serving Martinsville consists, in a general way, of three small generating plants located at Clinton, Sullivan and Martinsville; 350 miles of high voltage transmission lines; 135 miles of low voltage transmission lines; 52 high voltage substations; 39 low voltage substations; 61 distributing systems; 46 rural distribution systems; and 16930 meters in service (R. 81-82).

The Master found that it was not necessary in this case to find the fair value of all of appellant's property regardless of how it is used or where it is located (R. 110). He found that in making allocations of power system value and power system expenses to Martinsville it would be unfair to Martinsville customers to eliminate from the calculations the current sent from Indiana Electric Corporation over appellant's lines to affiliated companies for their uses, thus leaving a major use uncompensated and placing a major expense incident to such use on appellant's local customers (R. 111, 112). The Master also found that appellant's suggested elimination in its exhibit 28 of a portion of the value of its Clinton-Lafayette line and of a portion of expense on account of the use of that line for affiliated company purposes does not leave the remainder as representative of property used and useful only for appellant's own purposes, and that the suggested allocation in exhibit 28 is not a fair division or proper allocation of plaintiff's power system property as a whole as to use for appellant's own

customers and as to use for its affiliated companies (R. 113).

The Master found that the "gateway" rate of $.022897 for Martinsville used by appellant in its exhibit 28 is not justified by the evidence in the record, or by good reasons (R. 120).

THE EVIDENCE.

There are in order some corrections of, and supplements to, appellant's statement of the evidence.

Correction. Appellant's statement at page 11 of its brief that its entire electrical property "is shown without dispute to constitute one single physical and economic operating unit" is completely erroneous. The evidence shows that property in its entirety to be anything but a physical and economic unit. The true character and the uses of this property will presently be shown from the evidence. From that will also appear the incorrectness of appellant's next statement that its entire property constitutes a single unit the same as an electric property in a single community does. And, contrary to appellant's statement at pages 11 and 12 that the Martinsville local property has no separate existence from an operating or economic standpoint, it will appear that this local property constitutes a unit of property that is devoted exclusively to the public unit that exists within the municipality of Martinsville, and that its sole excuse for being is to give service to that public unit.

A true and complete understanding of the character and uses of appellant's electrical property calls for the evidence as to its kind and location, its physical relations

to other like properties, its uses to serve the public in other territories, its real ownership and actual management and operation, and as to other relevant facts.

Appellant's property is of two kinds, viz.: (1) local distribution systems located in numerous, isolated and widely scattered communities, and none of which, except the one in Martinsville, are of any use in rendering electric service in Martinsville. Plaintiff's witness Spooner so testified (R. 205). These local properties at Martinsville and in numerous other communities had been built by other companies and were afterwards purchased by appellant (R. 203). The distribution system in Martinsville is used and useful only for giving service to the people in Martinsville (R. 202); and (2) transmission lines shown in green on Exhibit 1 (R. 274), substations, and three small old generating plants at Sullivan, Clinton and Martinsville, which stand as standby plants for the "affiliated system" (R. 191), and not for the cities where located (R. 182). The 33 K. V. line from Lenore to Martinsville (Ex. 1) is now a 66,000 volt line and connects with a 66,000 volt line of Interstate at Martinsville (R. 185).

The affiliated system consists of the properties of the seven affiliated companies, including appellant, named at the foot of the map (R. 274) and which properties are indicated by the yellow, green, purple, red, blue, brown and orange lines (R. 188). These interconnected properties of the affiliated companies are managed and operated as one property (R. 193).

Every dollar's worth of the stock and securities of appellant company, as well as those of the six other affiliated companies are owned by Central Indiana Power Company

(R. 236). These seven affiliated companies have a common president, Andrus, (R. 183) and a common vice-president, Schiez, (R. 230), who is also comptroller of the real owner of these properties, Central Indiana Power Company (R. 237). These are Insull companies (R. 188).

The construction of transmission lines or power system property by appellant or by any other of the affiliated companies is made under direction of the same management (R. 192). The power system property of appellant was not conceived for only its purposes. Its transmission lines were conceived and erected as a comprehensive part of the whole power distribution systems of the affiliated companies. Its lines are designed to coincide with a system comprised of all the affiliated companies' lines (R. 186).

Constructively, from an operating standpoint, the whole is one system, *but because of the existence of different companies* it is necessary to have a bookkeeping figure (R. 189). The common president of the affiliated companies exercises general supervision of their operation. He gives final approval for the different companies as to where they build lines. The question of where appellant buys its electricity is determined by the ownership of the lines (R. 189). The president, Andrus, of all affiliated companies is responsible for the operation and power supply of each and all of the interconnected companies (R. 183).

Current is metered as it leaves one company's property and goes on another. Those readings are washed out and the differential is settled for at one cent per K. W. H. It is a bookkeeping procedure. The one cent price is fixed by the common president. The interchange goes right on. If the companies make a pull-down on appellant, the cur-

rent flows in. There is no order directing the flow of the current, and no contract fixing the price of interchanged current (R. 186).

In 1930 there were about 35,000,000 kilowatt hours delived over appellant's Clinton-Lafayette line to Attica Electric Company and Northern Indiana Power Company from the Dresser plant, which is paid for at the rate of one cent. Appellant generates practically no power and buys practically all its current. If Northern Indiana Power Company and the Dresser plant want to exchange electricity, they do it over appellant's transmission lines, and plaintiff gets nothing from either of the companies for the use of its transmission lines (R. 187). The question of what affiliated companies should be charged by appellant for electricity delivered to them over its lines has never been taken up with the Public Service Commission to have a rate fixed (R. 187). Appellant gets for the current it delivers to affiliated companies at the north end of its lines exactly the same rate that it pays (R. 188).

The affiliated system is also connected at Martinsville with the system owned by the Interstate Public Service Company in Southern Indiana, whose lines and plants are operated in common with the operation of the lines and plants of the affiliated companies (R. 185), and which also is an Insull company (R. 187).

The affiliated system is also connected with another Insull plant east of the Illinois state line, State Line Company, which is the largest plant built anywhere (R. 182, 187).

The affiliated system is also connected with a new Insull plant at Michigan City, Indiana, with a view to releasing

current manufactured at Dresser for use elsewhere (R. 183).

The affiliated system is also connected with a large plant, Twin Branch, at South Bend, Indiana, and also to a large plant, Columbia, at Cincinnati (R. 181, 182).

The local generating plant at Martinsville once served that city, and it had no other source of electricity (R. 187). The current used at Martinsville now comes off a 66,000 volt line from Lenore substation (R. 185, 186).

The price that appellant pays its affiliated company, Indiana Electric Corporation, for current is fixed by Andrus as president of Indiana Electric Corporation, and not as president of appellant company (R. 192). The operations of the affiliated companies is under the same management (R. 192). Their properties are interconnected and are managed and operated as one property, but each company is a separate corporate entity owning separate property (R. 193).

Martinsville is a distinct municipality and is the county seat of Morgan County. It is one of scores of other separate and distinct municipalities, including numerous other county seat cities, scattered in the large expanse of territory occupied and served by the singly managed affiliated power system property and of which appellant's power system property is but a related and integraded parcel (Map, R. 274). The local properties, at Martinsville and elsewhere, were acquired by appellant after others had built them, and its power system property was constructed in recent years (R. 203).

Correction. At page 16 of appellant's brief it is said that appellant has established and maintained uniform

rates for the same classes of service in cities, towns and communities of the same class. The uniformity testified to (R. 192) is only that appellant has essentially uniform "lighting and large and medium power rates" in its territory, and that essentially uniform rates are in effect throughout the territory of the affiliated companies in order to prevent rate discrimination between various "cities". The 100 rate reductions made though approved by the Commission were made without hearing (R. 192). There have been no company-wide rate inquiries before the Commission for appellant or for any of the other of the affiliated companies (R. 193). It has been *attempted* to make similar rates for similar classes of service in cities of the same size (R. 185).

Gateway Cost. The common president of the affiliated companies, Andrus, testified: "The cost per kilowatt hour outside of the municipalities is less than the cost for kilowatt hour delivered to the city gateway because the load factor outside is much better than the load factor inside cities" (R. 185). But no evidence was given to show what that difference in cost would be. On the contrary, appellant's witness, Sittinger, testified: "The same gateway cost to all cities and towns and all power customers connected to this system would be bound to prevail if a gateway price is to be based on the system as a whole. *I should think that within the Wabash Valley property the same gateway price to all the gateways of the different towns and to each and all of the power customers, like coal mines and gravel pits, would be equitable*" (R. 227).

Correction. At page 18 appellant's brief says it "offers" current at the Martinsville substation for local dis-

tribution in Martinsville at a cost of $.024996 per K. W. H. There is no such evidence, and no such charge is made in fact. That rate of charge was computed for 1928 by appellant's vice-president, Schiez, in his exhibit 21 (R. 289) for the purpose of this case. That computation is made on the basis of Spooner and Merrill's appraisal and not on the power system value found by the court and includes a 4% annual depreciation charge and an 8% (not 7% as found by the court) return on that appraisal (R. 289). Moreover, appellant's power system was used in 1928 to deliver 37,687,220 K. W. H. to affiliated companies (R. 291) for which they were charged only 1¼ cents per K. W. H. (R. 234). To deliver that much current appellant had to receive 42,238,947 K. W. H. at 1 cent onto its lines from Indiana Electric Corporation (R. 291) because 10.7% was lost in transmission (R. 291). This line loss and all power system expense, and all annual depreciation and return requirements on appellant's power system property were thrown on the cities and towns served by appellant's power system property in the computation of the $.024996 gateway charge (R. 289). That computation of that gateway charge was made in exhibit 21 for use in the computation at page 2 thereof (R. 288) to support an alleged deficit of $1,575.32 from Martinsville business for 1928 under existing rates and to support an alleged deficit of $16,141.65 under the rates in question, again using the Spooner-Merrill appraisal for the Martinsville local property, and including in Martinsville local operating expenses $5,180.65 "annual amortization for this rate case expense" (R. 288).

Appellant's statements on page 18 of its brief concerning costs of manufacturing current by means of a local plant

are not complete and are inaccurate in some respects. Appellee's witness, Husselman, an experienced engineer, prepared exhibit 127 (R. 321) of the cost of an adequate Diesel engine plant at Martinsville to produce locally the energy there required, and of the cost to produce the energy by such a plant, which he found to be $.0188136 per K. W. H. His testimony thereon is at R. 267, 268.

Husselman's computation of $.446 per K. W. H. in appellant's local Martinsville plant was not made on the question represented at page 18 of appellant's brief. That computation was made in his exhibit 129 (R. 321, 322) on the question of the value of the local plants at Martinsville, Clinton and Sullivan as standby plants to the whole affiliated system, and he there showed that every kilowatt hour manufactured by those plants in 1929 actually cost $.446. That exhibit shows that the power so manufactured cost $83,004.38 to effect a saving of $21,942.00 in not taking the current under appellant's contract with Columbia Power Company.

The other kilowatt hour costs set out at page 18 of appellant's brief are figures prepared by certain of appellant's witnesses as a result of computations made by them on various bases of manufacture by hypothetical local steam plants involving remodeling the local standby plant on two plans and using it again for local generation purposes, and by the construction of a new local steam plant (Hamilton, R. 217, 218; Sittinger, R. 223-228; Martin, R. 214-216).

Appraisals made for both merger and rate hearings.

In 1927 there was a petition before the Public Service Commission to merge appellant and ten other subsidiaries

of Central Indiana Power Company. Spooner and Merrill's Sept. 1, 1927, inventory and appraisal of appellant's entire property, along with appraisals of the ten other companies, was made and used for that merger hearing. Spooner was employed by the Central Indiana Power Company to make these appraisals of the properties of its eleven subsidiaries (R. 203), and his bill for services for making all of these appraisals went to the same place. Spooner does not know how his charges were distributed as between the merger and rate hearings (R. 203).

The Commission engineers also made appraisals of the entire property (R. 243), for the 1928-29 merger hearing. Their appraisal in this case of appellant's power system property was prepared from the appraisal used in the merger case (R. 247). The power system property was segregated from the general inventory and appraisal used in the merger proceeding in accordance with appellant's instructions to its auditing department for the classification of its electrical properties (R. 247).

Appellant's brief at page 20 does not fairly present the character of appraisals made by the Commission engineers. The Commission engineers, under the general supervision of Mr. Wenger, chief engineer (R. 262), and in direct charge of Mr. Abbett (R. 243, 246), made inventories and appraisals of both the Martinsville local property and of appellant's entire power system property. They did not, for the purpose of this case, make an inventory and appraisal of the other local properties in the fifty other communities and which Spooner testified are of no use in giving service in Martinsville (R. 205).

The May 1, 1930, inventory used for the Martinsville

local property was made jointly by the Commission engineers and Spooner and Merrill (R. 243). In their appraisal of this local property, the Commission engineers used May 1, 1930, prices (Exh. 100, R. 307, and Exh. 101, R. 308), whereas Spooner and Merrill and Stone and Webster used May, 1, *1929*, prices (Exh. 2-H, R. 275, and Exh. 8, R. 278). The Commission engineers' May 1, 1930, appraisal of the Martinsville local property is $83,000 (R, 307, 308).

The inventory used by the Commission engineers in their appraisal of appellant's power system property was procured from a Sept. 1, 1927, inventory and appraisal of the entire property used in the merger proceeding (R. 247). To this power system inventory they applied March, 1929, prices (Exh. 103, R. 308, Exh. 104, R. 309), and added net additions to December 31, 1929. This appraisal is $2,868,366. Spooner and Merrill and Stone and Webster also used a Sept. 1, 1927, inventory for their appraisal of the entire property (local and power system), but applied May 1, 1929, prices, and added net additions to May 1, 1930 (Exh. 2-G, R. 275, Exh. 7, R. 277). Stone and Webster's appraisals resulted from a check up of Spooner and Merrill's appraisals (R. 219). In Exhibit 7, Stone and Webster added a "general contingency" item of $160,000, which ordinarily would be distributed under the head of structural costs (R. 219, 220). This item was added because they thought Spooner and Merrill's unit prices were 5% too low (R. 222).

The unit prices used by the Commission engineers were by them thoroughly analyzed. (R. 243, 244, 245, 252, 253). These unit prices used by the Commission engineers are

based on actual construction practice and are the same type that a contractor would use in his estimating department. There are seventeen engineers in the Commission's engineering department. The costs used in their appraisals are made up from continuous studies wherever accurate data can be obtained. Set-ups are continually changed to agree to actual practice. Data so obtained is kept in the files of the Commission (R. 261, 262). Abbett obtained quotations for the various materials, freight allowance was made, and 3% added to take care of storage and purchase. Copper prices were obtained as of May 1, reckoned in carload lots. Prices and transformers were gotten from appellant's books. The labor set-ups were those found in experience to be a practical method of doing the work. (R. 243, 244).

The Commission engineers observed the condition of the property by inspection and an estimate was made as to how much of the life of the useful property had been consumed (R. 246).

The unit prices used in the Stone and Webster appraisals "were made up by one of their men in their office who never saw plaintiff's property and who never came on the grounds" (R. 225).

Husselman, engineer for the city, checked up on the Commission engineers' appraisal and found their unit prices to be correct (R. 269). He made his own appraisals as a result of this check-up, giving effect to reduced copper prices. In his exhibit 131 he appraises the Martinsville local property at $81,127 for May 1, 1930, and at $79,730 for Sept. 1, 1930 (R. 322). He appraises the power sys-

tem property (exclusive of the three local generating plants, R. 269) at $2,209,662 for Sept. 1, 1930 (R. 323).

Correction. Appellant's statement at page 20 that the Master ignored entirely the appraisal of Stone and Webster is incorrect. He devoted his entire Finding XII (R. 85, 86) to this appraisal, and found their unit prices to be too high, and their allowances for intangibles exorbitant.

Neither is it true that the Master rejected the appraisal of Spooner and Merrill as stated by appellant at page 20 of its brief. The Master thoroughly considered their appraisal in his Findings XI (R. 82), XIII (R. 82), XIV (R. 87), XV (R. 91), XVII (R. 93), XVIII (R. 93) and XLVII (R. 130). He found Spooner and Merrill's unit prices were too high on account of being loaded by certain percentages (R. 94). The Master adopted the unit prices used by the Commission engineers for the reasons stated by him in Finding XXIII (R. 100-102).

Approximately $40,000 of the fair value of $102,947 found by the Master for the Martinsville local property is based largely on Spooner and Merrill's views on certain items (R. 94-95). And only $1,765,530 of the $3,066,395 fair value found for power system property is based on the appraisal of the Commission engineers (R. 99 and Exh. 103, R. 308).

Appellant's statement at page 20 of its brief that the Master acted arbitrarily in his finding of the value of the entire property is incorrect. The Master found in his Finding XXVIII (R. 110) that it was not necessary in this case to value the entire property, including the numerous local distribution systems elsewhere which had no use to

Martinsville. But it being appellant's theory that it was entitled to a finding of the value of its entire electrical property, including all local properties, the Master made such a finding (R. 130, 131). He did not act without evidence or arbitrarily in making that finding. The unit prices of Spooner and Merrill and of Stone and Webster which the Master found too high were used by them in their appraisals of the entire property. He had the Commission engineers' unit prices applicable to the Martinsville local property, and those applicable to the power system property, and which he found adequate and reasonable, before him for comparison. He had much evidence before him concerning allowances for undistributed construction costs, working capital and going value. There was no evidence that any conditions existed in respect to the reproduction new, or in respect to the accrued depreciation, of the other local properties different from those applying to the property, which he had already valued. Hence, it was reasonable to find that the excesses in the Spooner and Merrill appraisals of the property already valued by the Master would appear in their appraisal of the rest of the local properties in about the same proportion.

Appellant's statement on page 21 of its brief based on its Exhibit 22 of income on its entire property is subject to the following explanations: The only compensation included on account of the affiliated use of appellant's power system property is that the current delivered to affiliated companies is computed at a quarter cent per K. W. H. higher than it is charged to appellant (Exh. 22, R. 295). Up to Dec. 1, 1929, it was a fact that affiliated companies were charged at the rate of 1¼ cents per K. W. H. for the

current they received from appellant's lines, but since then it has been charged to them at 1 cent the same as it is charged to appellant (R. 234), and appellant now absorbs the line losses incident to its transmission. The "Gross revenue" of $1,741,308.40 therefore (R. 295) contains a fictitious amount that is determinable by the quantity delivered to affiliated companies from Dec. 1, 1929, to May 31, 1930, at one quarter cent per K. W. H., and which appellant never received.

The 4.15% return on appellant's entire property for 1929 is also subject to the explanation that the whole power system expense and the whole requirement for annual depreciation is included in the calculation, and that the only compensation for use of appellant's power system property for affiliated companies is found in the one quarter cent per kilowatt differential that was charged for the first eleven months of 1929.

No evidence was introduced to show that Central Indiana Power Company as the real owner of the whole affiliated system used and operated as a whole was not getting a fair return on the whole.

Appellant's statement, at page 21 of its brief, that in finding that 3.3% of appellant's power system property should be apportioned to Martinsville, the court gave no consideration to the "actual uses" to which the property is shown by the evidence to be put, is completely erroneous In the court's 12th and 13th findings (R. 164-167) the court found the facts as to the actual uses of this power system property and considered them expressly in relation to the question of apportionment of power system value,

and in which finding it based the 3.3% on the basis of the "actual use" of the property.

It is true, as contended by appellant at pages 21 and 22 of its brief, that if the court had excluded the use of appellant's power system for transmitting current to affiliated systems and if it would have saddled the whole expense, maintenance, annual depreciation and return requirements of appellant's power system property only on the local communities in appellant's territory, a higher apportionment would have resulted. Much of the evidence of the actual use of appellant's power system property as an integrated parcel of the affiliated system under the common management and common operation has hereinbefore been set forth. The evidence shows that appellant's lines are used as a part of the affiliated system, under what is in reality a common ownership and under an actual common management and operation, exactly as it would be used if there were but one corporation owning the whole affiliated system. Appellant manufactures no current for sale and is purely a distributing company (R. 187). Its lines are used as a conduit (R. 187) to transmit current to affiliated companies which distribute it to communities and their territories the same as appellant does. Of current so transmitted to Northern Indiana Power Company over appellant's lines, 2,917,098 K. W. H. were wholesaled to the Tipton Municipal plant for $.0162 per K. W. H. (Exh. 124, R. 320) in 1929 (R. 265). Tipton is of comparable population and consumption (Exh. 124, R. 320) to that of Martinsville (R. 265).

The use of appellant's lines to transmit current from Indiana Electric Corporation to Northern Indiana Power

Company's power system property or to any part of the affiliated system is not in virtue of any contract (R. 186). The passing of current onto appellant's power system property and from there onto power system properties of other affiliated companies does not constitute deliveries under purchases and sales between them and the rate at which monthly settlements are made are not wholesale or any other kind of sale rates. They represent a mere "figure for bookkeeping purposes", because of "the existence of different companies" which own parts of the affiliated system which is "one system" from "an operating standpoint" (R. 189). The 1 cent rate at which differentials is settled is not contractual, but is fixed by Andrus (R. 186) as chief executive of all of the affiliated companies, and who is individually "responsible for the operation and power supply of each" (R. 183). There is not even an order directing the flow of current interchanged, but it "goes right on". If the companies make a pull down on appellant, the current flows in (R. 186). "The properties of the affiliated companies are managed and operated as one property" (R. 193).

In appellant's table, following page 26 of its brief, on Martinsville local electric property the item of "working cash" in the Spooner and Merrill appraisal is given at $5,358, whereas it is $3,358 (Exh. 2-H, R. 275), and was adopted by the Master (R. 95).

Appellant's statements at pages 27 and 28 of its brief that the Master's finding on values is discredited because he failed to follow its engineers is unwarranted by the evidence. The manner in which the Master thoroughly considered all appraisals has already been set out herein-

before. The three-judge court also had before it all of these appraisals and the testimony of all engineers, and considered appellant's exceptions to the Master's findings of value, and the court came to the same conclusions on values as the Master did. Appellees' engineers are well trained and experienced appraisers (R. 242, 243; R. 261; R. 266) and to the extent that the Master and the court gave their appraisals and testimony credence, it was well founded.

Appellant is a subsidiary wholly owned by Central Indiana Power Company, and appellant incurred no cost of financing in procuring the capital for the acquisition and construction of its properties. The parent company took all its securities and furnished all its capital, and advances money to appellant from time to time to finance its capital expenditures (R. 236).

The bill of complaint does not complain of the $4,000 rate case expense fixed by the Commission order. The evidence thereon that the Commission had before it was not introduced at the hearing of this case. The proceeding before the Commission was on at the same time that the merger proceeding was before it involving appellant and ten other subsidiaries of Central Indiana Power Company, and the appraisals of appellant's entire property were then made for the merger as well as for this proceeding (R. 203; 262); most of appellant's rate case expenses were incurred since the hearing before the Commission. By the end of 1928 they were shown on appellant's books at $25,972.64 (R. 317). Over $35,000 has been incurred since then.

No evidence was introduced from which a finding of

their necessity or reasonableness could be made. No data as to the number of days devoted by accountants, engineers or attorneys, or as to the reasonable value of such services, or any other data than the bare charge was shown. Spooner and Merrill made no separate billing on account of the rate case, but billed Central Indiana Power Company for all work done in the merger and rate proceedings (R. 203).

The evidence shows that some of the expense incurred is for making inventories and appraisals of fifty or more local distribution systems that have no use in serving Martinsville (Exh. 2-D, 2-E, R. 205). The evidence shows also that the appraisals made have equal value to more than fifty other communities besides Martinsville. No evidence was introduced to show that it would have been reasonable for the Commission to charge more than $4,000 against Martinsville.

In addition to the evidence on rate of return set out in appellant's brief at page 30, it appears that appellant had a surplus of $1,074,739.71 on Jan. 1, 1929, and a surplus of $1,257,884.64 on Dec. 31, 1929 (R. 313). Spooner testified that a 7% return is sufficient, except that to accumulate a surplus the rate should be not less than 8%.

SUMMARY OF ARGUMENT.

Appellees assert two general propositions:

A. The facts proved fail to show the rates are confiscatory at or since their effective date, and hence the bill is not sustained.

B. On the contrary, the rates are shown sufficient at all times since their effective date to yield a fair return on the fair value of the property actually employed in giving service to the public in Martinsville.

Points on Proposition (A), supra.

I.

Investigation and fixing of rates for service to the public unit in Martinsville are authorized by provisions of statute.

Secs. 12728, 12743, Vol. 3, Burns Ann. Ind. Stat. 1926.

The indeterminate permit under which appellant operates, and the dedication of its property to public use are subject to the foregoing provisions.

Secs. 12773-12775, ibid;
Chicago, etc., R. Co. v. Guilfoyle, 198 Ind. 9.

The principle is established that when the inquiry is as to the reasonableness of rates for service rendered in a segregated use of property that is devoted to several uses, the fair value of the property as it is employed in the

segregated use is the base for testing the rates, and that apportionment of value is required to ascertain that base.

Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 149;
Minnesota Rate Cases, 230 U. S. 352;
United Gas Co. v. R. R. Com., 278 U. S. 300;
Hardin-Wyandott Lighting Co. v. Public U. Comm., 118 Oh. St. 592; 162 N. E. 262;
Eau Claire v. R. R. Comm., 178 Wis. 207; 189 N. W. 476; P. U. R., 1922-D, 666.

II.

The segregated use here involved is the use of appellant's property as employed in giving service to the public unit in the City of Martinsville. Since the inquiry has throughout been limited to rates in Martinsville and since the power system is also used for the convenience of other public units in many other municipalities, it is necessary to a test of the rates in question to ascertain the fair value of the property actually employed in rendering service to the public in Martinsville. The property so employed consists of the local distribution system located in Martinsville, together with a portion of the power system property (Court's finding 8, R. 162).

Even where all rates of a Wisconsin utility operating a similar electric property were in review, it was held by the Supreme Court of that state that segregation of uses according to municipalities served had to be recognized under the Wisconsin utility act (after which the Indiana act

is patterned), and that fair apportionments of power system property to the segregated uses had to be made.

> Eau Claire v. R. R. Com., 178 Wis. 207; 189 N. W. 476.

III.

It was not necessary to evaluate the entire property in order to find the rate base for Martinsville rates, as contended by appellant. The local distribution systems in fifty other cities, towns and communities are not employed in giving service to the public in Martinsville, and they need not be included to obtain the fair value of the property that is so employed (Spooner, R. 203, 205; Court's finding, 8 R. 162). In a similar situation the Supreme Court of Ohio held:

> It is self-evident in a rate controversy involving public utility rates charged in a particular municipality that only property used and useful in furnishing service in such municipality should be valued for the purpose of establishing such rate.
>
> Hardin-Wyandott Lighting Co. v. Public Utility Com., 118 Oh. St. 592; 162 N. E. 262.

IV.

Among the uses to which appelalnt's property is dedicated is the use of it for furnishing electric service to the public unit existing in Martinsville. There is no constitutional principle forbidding the reduction of rates applicable only in this particular community unless a fair return is, or will be, earned on appellant's entire property,

as appellant contends for at page 32 of its brief. That contention begs the whole question of whether the particular rates in issue are reasonable, and it is completely answered by the following language of this court:

> But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.
>
> Interstate Commerce Commission v. Union Pac. R. Co. (1911), 222 U. S. 541, 549.

V.

The calculations of earnings on the entire property, as appearing on page 33 of appellant's brief, are based only on what the accounts as kept by appellant show, and they do not fairly reflect the net earnings of appellant's entire property from all uses actually made of it. All operating expenses, maintenance, taxes, and annual depreciation charge relating to appellant's power system property are charged against only the revenues appellant collects, and the real earnings from the use of appellant's power system for affiliated system convenience are not included in those revenues. A disclosure of the earnings of Central Indiana Power Company as the real owner of the whole affiliated system and as the real recipient of all earnings from the

whole affiliated system operated as one system would come nearer showing the real truth about the earnings that are being made on the property that stands in appellant's name, but appellant made no such disclosure. But proof of failure of appellant's entire electrical properties to earn a fair return from all uses made of it would not supply the necessary basis upon which the reasonableness of the particular rates in issue must be tested. Appellant's failure to establish that necessary basis by facts proved constitutes a failure to sustain its bill.

Minnesota Rate Cases, 230 U. S. 352;
Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 149.

VI.

Appellant's exhibits 21, 22 and 28 (R. 288-297, 299-305) offered to show that it was operating the Martinsville business at a deficit in 1928 under the old rates, and that under the new rates there would be a large deficit for the year ended May 31, 1930, do not prove that the new rates are in truth insufficient to yield a fair return on the fair value of the property employed in giving service to the public in Martinsville. All of these exhibits involve unfair treatment of the affiliated system use of appellant's power system property and they place unfair burdens on Martinsville consisting among other things of unfair expenses and charges for annual depreciation and return on power system property, also an unwarranted charge for rate case expenses and a too great charge for annual depreciation on the local property. The calculations are on the maximum figures in Spooner and Merrill's appraisals

instead of upon fair values. The defects in these exhibits will be further shown in Argument, post.

All of appellant's proofs put together fail to sustain its bill, but appellee's proofs show that the rates are, upon fair consideration, sufficiently compensatory.

Points on Proposition (B), supra; rates are compensatory.

I.

(a) The apportionment of power system value to Martinsville use rests expressly on considerations of the actual uses made of the power system, including the true character of the affiliated system use (court's findings 12, 13, R. 164-168), and is the fairest apportionment that could be made on the facts proved.

(b) The cost of power used in Martinsville at the rate of $.0133 per K. W. H. at the Martinsville substation, exclusive of charges for depreciation and return on power system, rests on appellant's accounts as an average cost at substations and upon the actual uses made of the power system property. It was used in the court's computations (R. 168) because no facts were proved from which in fairness a different than average power cost could be computed for power furnished at Martinsville. This average power cost is supported by appellant's witness, Sittinger (R. 227).

II.

The fair values found for Martinsville local and for power system properties rest on a thorough and careful consideration of all appraisals and testimony (Master's

findings (R. 82-103, 118), and are not open to just criticism. It must appear clearly on appeal that the values found below are incorrect.

United Gas Co. v. R. R. Com., 278 U. S. 300.

The asserted item for cost of financing was properly excluded on the testimony of appellant's vice-president, Schiez (R. 236).

New York Tel. Co. v. Prendergast, 36 Fed. (2d) 54, 64;

Galveston Elec. Co. v. Galveston, 258 U. S. 388, 397.

III.

No facts were proved from which a finding could be made either that appellant sought a greater rate case expense allowance from the Commission, or that the amount ordered is unreasonable upon the evidence before the Commission (Master's finding, R. 114-116). To assert a rate case expense of $60,000 against Martinsville revenues in the test of the reasonableness of the rates at issue is to suggest a practical method of defeating all attempts by a single municipality served by a large electric empire to provoke inquiries into electric rates charged it and its residents, and ought receive no more consideration than the court below gave it. A statute directed the Commission to exclude unnecessary or excessive expenditures in rate determinations.

Indiana Acts 1927, C. 146, p. 445 (Sec. 12722 Burns, Vol. 4, 1929 Supp.).

IV.

A composite charge of 4% on fair value is fair for annual depreciation (R. 168); and an annual rate of return of 7% on fair value is fair (R. 119, and 168). Appellant's witness, Spooner, supported a 7% rate of return exclusive of provision for accumulating a surplus (R. 207), but appellant had a surplus of $1,257,884.64 at Dec. 31, 1929, as against a surplus of $1,074,739.71 at Jan. 1 of that year (R. 313). What is here a reasonable rate of return depends on the facts in this case.

Smith v. Illinois Bell Tel. Co., 282 U. S. 133, 160, 161.

V.

The court's tests of the rates (Finding 15, R. 168, 169) on the rate base consisting of the fair value of the Martinsville local property with the apportioned part of the fair value of power system, is the most reliable test that can be made on the facts proved, and does not involve substantial errors (See also Master's findings R. 123-125).

Appellant's comparisons of computations at pages 92 and 93 of its brief are worthless. One reason is, the computations compared are not made on the same plan of test. In appellant's computation depreciation and return on power system are already included in power cost computed at $.022897 per K. W. H. (Ex. 28, R. 300), and appellant again includes a charge for depreciation on apportioned power system (appellant's brief, p. 93).

VI.

Under a "gateway" test, where power cost includes depreciation and return on power system, as employed in

appellant's exhibit 22 (R. 292-297), the rates are sufficiently compensatory if the test is made on facts fairly found. The Master's findings show this in tests made by him under this plan (R. 125-130). Moreover, power used at Martinsville could be computed at as high a gateway charge as $.02021 per K. W. H., and the rates would still yield a fair return of 7% on the fair value of the Martinsville local property (Master's finding XLII, R. 126).

VII.

The rates, if in force, would at all times since the effective date of the order have yielded a fair return of more than 7% per annum, on the fair value of appellant's property employed in rendering the service to which the rates apply (Court's findings 15, 16, R. 168, 169). Hence, the court's conclusions of law (R. 169, 170) to the effect that the evidence fails to show that the rates are confiscatory; that they are shown to be compensatory; and that the bill should be dismissed for want of equity, are right.

ARGUMENT.

A. The facts proved fail to show the rates are confiscatory at or since their effective date, and hence the bill is not sustained.

I.

(Answer to I, p. 32, Appellant's Brief)

The fair value of the property actually employed in rendering service to the public in the City of Martinsville is the rate base.

In testing the rates at issue the court below did not treat Martinsville as a self-contained rate area as though it were served only by means of property there located, and it did not treat appellant's Martinsville property as a segregated unit of property independent of its relation to other property of appellant. On the contrary, the court found that appellant's electrical property, of which that at Martinsville is a part, is devoted to numerous uses, including its use to the public in Martinsville.

The court found, and held, that the use of appellant's property wherever located for giving service to the public in Martinsville must be considered as a segregated use and the court separated from the whole that property, wherever located, which is actually employed in rendering service in that segregated use in order to find a fair rate base upon which to test the rates at issue and which rates are applicable only to the service rendered in that segregated use.

Under this plan of separation, the court found that the portion of appellant's entire property that is employed in giving service in Martinsville consists of the local distribution property in that city, together with a portion of the power system property located outside the city, and found also that appellant's local distribution properties located in other cities, towns and communities were not used or useful for furnishing service in Martinsville (Finding 8, R. 168).

This finding certainly speaks the truth, for appellant's own witness, Spooner, testified (R. 202) that "The distribution system and some local items in the power plant in Martinsville is used and useful only for giving service to the people in Martinsville," and (R. 205) that "The other property of local character outside of Martinsville is not used in bringing electricity to Martinsville."

The evidence is undisputed that the three small power plants, including the one at Martinsville, are not operated for the convenience of the cities in which they are located (Andrus, R. 182), nor even for appellant's own purposes, but for the convenience of the *affiliated* system (Andrus, R. 191). The "items in the power plant in Martinsville" mentioned by Spooner as belonging to local property were included by the Master in the local property (Finding XXI, R. 97), also by the court ($10,936 item, R. 163). The evidence is also undisputed that appellant's widespread transmission lines, etc., including the three small power plants, are used to serve not only Martinsville, but fifty widely scattered cities, towns and communities in appellant's own territory and, in conjunction with similar power systems of affiliated companies, it serves an even

greater number in other territories and the court so found (Finding 5, R. 159, 160, Finding 12, R. 164-167).

The court then found the fair value of appellant's property as employed in the service to the public in Martinsville to be $189,467.39 at Feb. 1, 1929, and $204,138.00 at May 1, 1930, and the rates in question were then tested on these values (R. 168, 169) and were found to be sufficiently compensatory for the service and property involved (R. 169). The matter of how these values were found, how expenses were separated, how power cost was computed, how operating revenues from the new rates were determined, and other factors entering into the tests of the rates made by the court will be discussed later in this argument.

Appellant denies the validity of the segregations, apportionments and tests made by the court by the argument that it has not consented to that kind of treatment of its property in that it has not dedicated its property to a segregated use at Martinsville, but that the dedication it has made is of the entire property as a single operating unit and that there is a "constitutional principle" which forbids reduction of its rates at Martinsville by public authority unless the earnings of the entire property after such reduction shall be sufficient to yield a fair return upon that property as a whole, and appellant then argues that the earnings on the whole did not make a fair return before reduction and, hence, that the reduction made necessarily results in confiscation of the whole property.

Appellees shall demonstrate that the whole argument and the conclusion resting on it are completely fallacious.

First, as to the authority of the Commission to investigate and fix the rates in question in a proceeding involving only those rates. It should be remembered that the jurisdiction of the Commission was invoked upon complaint by seventeen of appellant's customers resident in Martinsville and by the city for the purpose only of having the Commission investigate and fix reasonable rates to be charged in that city. No steps were taken by appellant, as respondent to that complaint, to have any other part, or all, of its rates chargeable elsewhere investigated with a view to their adjustment or change. Instead, appellant moved for more detailed specification of the rates complained of (R. 18), whereupon an amended petition was filed specifying that the electrical rates, tolls, charges, schedules, joint rate or rates of the respondent charged its consumers *in the City of Martinsville* are unreasonable and excessive, etc. (R. 19). The proceeding resulting in the rates at issue was on the amended petition and on a lengthy answer thereto (R. 19-24) which was in three paragraphs, in the third of which appellant sets up complexities which it says makes it "impossible to fix a specific cost to any community or district without considering it in its relation to all other districts, communities and persons served by said respondent throughout its said system" (R. 21), and permission is asked (R. 24) to make permanent, after further observation, a preliminary schedule which it had offered pending the proceeding and which it was permitted to put in effect (on July 1, 1927) pending the investigation under way (R. 17).

Incidentally, these July 1, 1927, preliminary rates did not produce less operating revenues than the old rates did.

For 1928 the preliminary rates produced an operating revenue at Martinsville in the sum of $94,990.13 (R. 161), and appellant's vice-president and auditor, Schiez, testified that "Plaintiff company considers the rate put in effect in Martinsville on July 1, 1927, a fair rate" (R. 235) and yet he admitted that his "Exhibit 21 shows a deficit in 1928 of $1,575.32 at Martinsville under that voluntary rate" (R. 235). In face of this purported deficit for 1928 under rates which the company considers fair, we are tempted to transpose from page 45 of appellant's brief, where it has no application, to this page where it does, the quotation there set out from an opinion of this court, viz.:

> Such a result indicates that there is something wrong in the process by which the conclusion is reached.

But to return to the subject of the Commission's authority to fix rates applicable only in Martinsville. That is a county seat city of about 5,000 inhabitants, in which, before appellant acquired the electric utility, electricity was supplied from a local plant (R. 157). Appellant is the only utility furnishing electric service in Martinsville, and it operates there under an *indeterminate permit* from the State of Indiana and under the terms and provisions of the Shively-Spencer Utility Commission Act of said State (R. 160). Sec. 57 of said act (12728, Vol. 3, Burns Ann. Ind. Stat. 1926) expressly provides that when a municipal organization or ten persons complain to the Commission against any public utility that rates in which they are directly interested are in any respect unreasonable, then "the Commission shall proceed, with or without

notice, to make such investigation as it may deem necessary or convenient," and, after formal public hearing, the Commission shall "by order fix just and reasonable rates, * * * to be imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable," etc. (12743 ibid).

It is this act which authorized the indeterminate permit under which appellant's property is dedicated and operated at Martinsville for the convenience of the public, and not only is that indeterminate permit expressly made subject to the rights and authority provided for in section 57, supra, but by accepting it appellant had to consent to said provisions (12774, ibid.). Thus, the municipal unit in utility regulation was clearly preserved.

It therefore is apparent not only that the Commission had express statutory authority to investigate and fix rates to be charged in Martinsville, but also that the dedication of appellant's property is subject to that authority, for by the acceptance of its indeterminate permit to own and operate its property in that city appellant did as a matter of law consent to the fixing of rates applicable only in that municipality. And when appellant changed the mode of producing electricity for distribution in Martinsville by substituting for the local generating plant its transmission lines, etc., it did so subject, nevertheless, to the same authority in the Commission to fix rates for Martinsville as obtained when electricity was generated locally. Appellant could not escape that authority, or render the statute conferring it nugatory, by the mere fact that it now employs in part some different property differently located in rendering service in Martinsville.

The use made of whatever property that is employed for service in Martinsville in common for service elsewhere constitutes, nevertheless, a separable use under the very authority from which appellant's sole right to operate any of its property is derived and to which authority it has consented by its acceptance of its indeterminate permit to operate at Martinsville. The Supreme Court of Indiana has held that by the acceptance of an indeterminate permit under this act, a utility holds it subject to all the terms, conditions and limitations of the act, including "submission to the orders of the Public Service Commission in the matter of fixing rates."

Chicago, etc., R. Co. v. Guilfoyle, 198 Ind. 9, 16.

The Indiana act is patterned after that of Wisconsin, and the Supreme Court of that State held in a case even where the whole rate structure of a similar utility property was in review that under the Wisconsin act segregation of uses according to municipalities served had to be recognized and fair apportionments had to be made.

Eau Claire v. R. R. Com., 178 Wis. 207; 189 N. W. 476.

Appellant's criticism of the lower court's action and opinion, to the effect that it misconstrued the Indiana statute and placed its decision on grounds of public policy determined by a State legislature rather than upon considerations of the Federal constitution, is completely wrong. From what has already been said concerning the Indiana statute and appellant's assent to its provisions,

it clearly appears that the court below was right in treating the use of appellant's property as employed in serving Martinsville as a use that has to be segregated when rates to be charged in that city are to be determined or tested. Moreover, the statement in the court's opinion that if it is to be done otherwise the legislature must first so provide, is exactly right, for until the State, through its legislature, releases appellant from the terms and provisions in the present act to which appellant assented when it accepted the indeterminate permit, and until the legislature changes the mandate in section 57 to the Commission, it is wholly necessary to consider the segregated use in determining or testing rates for a single municipality. This is exactly the view taken in the Eau Claire case. After that case was decided, the legislature of Wisconsin amended the act of that State and authorized the Railroad Commission to consider two or more municipalities as a unit "if in its opinion the public interest so requires" (C. 390, Wisconsin Laws of 1929).

Moreover, it is certain from the facts proved and found that the use of appellant's property to give service in Martinsville is one of the uses which even appellant must admit is within the general dedication and uses of its electrical properties. It is also certain that there must be rates of some kind for the service rendered in this particular city, and certainly appellant's counsel must concede that the making of these rates is a legislative function of the State, which function must be exercised by the Commission either by way of approval of a schedule filed with it by appellant or else by way of fixing rates upon hearing and investigation. It is true that

Andrus, common president of appellant and of the other affiliated companies, testified that it was their position "that rate-making is the function of the management" (R. 185), but that does not supersede the statute. In no view can appellant be in stronger position to argue against considering particular rates for service in segregated uses than is a railroad or a vast telephone utility. It is firmly established that in the case of a vast telephone utility property there must be segregation of uses and apportionments to uses when particular rates are in question. Smith v. Illinois Bell Tel. Co., 282 U. S. 133; also in the case of railroads, Minnesota Rate Cases, 230 U. S. 352.

The many cases cited and quoted from in appellant's brief at pages 45-61 so patently fail to sustain its contentions against segregation of uses and against apportionments of property to uses that it is unnecessary to analyze them. The case relied on by appellant that comes nearest approaching the question under consideration is Michigan Bell Telephone Co. v. Odell, 45 Fed. (2d) 180, where the rate inquiry was company-wide and where it was held that Detroit could not be treated as a self-contained rate area. As already pointed out, Martinsville has not been treated as a self-contained rate area without regard to outside property employed in serving it. The Martinsville electric rates were not fixed in a company-wide rate inquiry as were the telephone rates to be charged in Detroit. The cited case does not hold that in the absence of a company-wide rate inquiry Detroit could not have rates only there chargeable inquired into. If it had so held, Smith v. Illinois Bell Tel. Co. would rule to the contrary. Again,

whatever might be said against segregation of uses according to municipalities served by a telephone utility cannot with equal force be said against such segregation of uses in case of an electric utility. An important distinction between the two services is obvious. Both the scope and the value of telephone service within any municipality are enhanced by facilities elsewhere making communication with the general public in other areas and municipalities possible. But electric lights may be just as bright and electric power may be just as potent if current is locally generated and distributed as if transmitted for local distribution from distant points of generation. In the latter method energy can be supplied at lower cost, but that method is not essential either to the quantity or quality of the energy demanded in Martinsville. But even in the telephone industry, segregation of uses and apportionments must be made when particular rates affecting even less than an entire single municipality are in question. Smith v. Illinois Bell Tel. Co.

It is clear from the reasons and authorities given that the lower court did not err in treating the use of appellant's property as employed in giving service in Martinsville as a segregated use and that it did not err in making apportionments of property to that use. And, as said in the similar case of Hardin-Wyandott Lighting Co. v. Public Utility Com. (Ohio), 162 N. E. 265, it is self-evident that for the purpose of finding the fair value of the property employed in giving service in one municipality it is not necessary to value the local properties in other municipalities. Appellant's witness Spooner supports this view. He said: "To obtain the amount of the

fair value of the property that would be used and useful in Martinsville the local property in the other towns and communities is not needed" (R. 203).

Appellant's contention that under the legislative direction to the Commission in section 12680 Burns 1926, where it is provided that the Commission shall value all property of every utility, it was necessary in this case to value appellant's entire property, including the local properties everywhere, is unsound. That section does not deal with the subject of rates. It expresses a general policy that the Commission should, after the effective date of the act, proceed to make valuations of all utility properties without reference to pending rate inquiries. There were several obvious reasons for that policy independent of what might be required in a particular rate inquiry. The provision in section 57, that when a rate inquiry is provoked the Commission "shall make such investigation as it may deem necessary or convenient" governs, and it was not necessary for the court below to value other local properties in order to find the proper rate base for Martinsville.

Second, as to the authority of the Commission to reduce rates at Martinsville unless thereafter the earnings from all sources made a fair return on the property as a whole. At page 32 of appellant's brief it is asserted that there is a "constitutional principle" which forbids the reduction by public authority of any rates in any part of the whole area where its property serves unless the earnings of the entire property after such reduction shall be sufficient to yield a fair return upon that property as a whole.

There is no such constitutional principle. The constitution protects utility property from confiscation as it is

in fact employed, and it must be proved that *as employed in the segregated use to which the particular rates apply* it is being confiscated before the rates will be interfered with. Minnesota Rate Cases; Smith v. Illinois Bell Tel. Co. Appellant's contention is completely answered by what this court held in sustaining an order of the Interstate Commerce Commission which reduced lumber rates to be charged by certain railroads. Interstate Commerce Commission v. Union Pac. R. R. Co. (1911), 222 U. S. 541, 549.

It is too obvious to require much argument that the rates to be charged at Martinsville must be tested on some more cogent and reliable basis than on a showing (defective at that) that a fair earning is not had on the entire electrical properties as a whole. Appellant's conclusion that the Martinsville rates are of necessity unreasonable and confiscatory by no means would follow from a mere showing of failure to earn a fair return upon the whole electrical properties. A single assumption will demonstrate the fallacy of the conclusion drawn. Suppose the existing Martinsville rates (which Schiez says the company considers to be fair) were twice as high as they are, and thus admittedly unreasonably high. On that assumption there would, in 1928, have been $94,990.13 more (R. 161) realized out of the Martinsville business. Add this amount to the $232,266.51 which appellant's Exhibit 21 (R. 288) represents as available for return in 1928 on its entire properties and the substituted figure would then be $327,256.64, making a return of 6.5+% instead of the 4.62% return show in Exhibit 21 (R. 288) and still a fair return (7%) would not be earned on the

fair value contended for by appellant for its entire properties. Yet if those were the facts, appellant's argument means that there is a "guiding constitutional principle" which would forbid considering Martinsville rates on their own merits on a fair basis and would forbid making a reduction in them.

But resort need not be had to assumption to demonstrate the fallacy of the conclusion drawn by appellant. Facts found by the court will supply the needed data. Andrus testified that a great many coal mines and gravel pits were served by appellant, and that more than 50% of the kilowatt hours sold to individual meter customers is furnished to such industries (R. 181). A material slump in that consumption had occurred (court's findings 5, R. 159, 160). This, of course, materially reduced earnings on the whole property. That shows one reason for the contended deficiency in general earnings, but it is not a good reason for preventing the fixing of Martinsville rates on a fair basis. Again, the exclusive use made of appellant's three small generating plants for *affiliated system* convenience (R. 159), and the free major use of its transmission lines to transmit energy from Indiana Electric Corporation's lines over a wide expanse of territory onto the lines of affiliated companies to the north (Findings 12, R. 164-167), without any substantial reciprocal use to appellant in the lines of those affiliated companies (bottom, R. 166), furnishes potent reasons why the accounts as kept by appellant fail to show a fair return on its entire electrical properties. Then, too, some of the rates charged in some other communities may be unreasonably low upon their respective merits. None of the

rates in force were fixed upon investigation and hearing and there never has been a company-wide rate investigation by the Commission (R. 192, 193). Such uniformity as there is in rates pertains to "lighting and large and medium power rates" (R. 192). Little energy to which power rates apply is used in Martinsville (R. 157). There are numerous reasons, some exhibited by the facts proved and found and others probable, which don't concern Martinsville rates but which may account for any deficiency in earnings upon the whole property.

It must not be understood that appellees concede that appellant's entire electrical properties are not in fact earning a fair return from all uses made of them in conjunction with the whole affiliated system. Central Indiana Power Company is the real owner of the entire affiliated system properties and is the real recipient of all net earnings therefrom under the common management and operation of it (R. 236). Whether from all uses made of appellant's property for the convenience of customers in its territory and in the territories of the affiliated companies a fair return is being earned for the real owner of the whole affiliated system is not shown by the facts proved. That fact would have more relevancy here than only what is shown by the accounts as kept by appellant. The failure of those accounts to show a true story of all net earnings made from all uses of the property which stands in appellant's name is obvious from a brief consideration of proved facts. All of the earning statements appearing in appellant's Exhibits 21, 22 and 28, as well as that in the Master's finding (R. 131) are predicated only on the facts shown in the accounts as kept by ap-

pellant. These accounts charge the whole operating and depreciation expense of appellant's power system against only the revenues which it collects, and they do not reflect all operating revenues inuring to the real owner through other affiliated subsidiaries which are in part derived from the employment of appellant's power system for affiliated system use and convenience.

But if it were assumed for argument that appellant's entire property is not earning a fair return on the whole use made of it, that would not be proof that the rates at issue are unreasonable and confiscatory of the property actually employed in rendering the service at Martinsville to which alone they apply. This is so, because that kind of proof furnishes no fair rate base representing the property actually employed, and it furnishes no apportionment of expenses to that service. Minnesota Rate Cases; Smith v. Illinois Bell Tel. Co. And upon those same authorities, it follows that in the absence of those essential facts there is a failure to sustain the bill.

By plaintiff's exhibit 21 it was sought to show that under existing rates, which the company considers fair, there is an operating deficit in Martinsville business; and in exhibits 22 and 28 it is sought to show that greater deficits would result under the new rates. None of these exhibits test the rates by the method used by the court. They employ the method of computing power used at a cost which compensates power system property. The calculations made in these exhibits will, in another connection, be shown to be unfair and unreliable, and to fall far short of constituting proof that the rates at issue are confiscatory.

B. The rates are shown at all times since their effective date to yield a fair return on the fair value of the property actually employed in giving service to the public in Martinsville.

II.

(Answer to II, p. 61, Appellant's Brief.)

The court made apportionments of (a) power system value, and (b) expenses, on an actual use basis.

Appellees agree that apportionment of power system must rest on the actual uses of that system. But the question of what those actual uses are is purely a *factual* question. The court made findings of what those actual uses are with express reference to apportionment (Findings 12, 13, R. 164-168, also Finding 5, R. 159-160), and then made an apportionment based upon the actual uses so found (R. 167, 188).

In obtaining the 3.3% which the court applied to power system value in order to obtain a fair share of that value that should enter into the Martinsville rate base, the court treated the energy transmitted over appellant's lines from affiliated lines onto other affiliated company lines, also the current manufactured by the three standby plants for exclusive affiliated system convenience at times of affiliated system peak demand, in the same category as the rest of the current constituting part of the affiliated system power pool flowing over appellant's lines and which was delivered at appellant's substations onto local distribution systems in appellant's territory. The figures from which the percentage of 3.3 is derived appear in the Master's find-

ings (R. 103-110). From those figures it appears that more than half of the current flowing over appellant's lines goes directly onto the lines of Attica Electric Company and Northern Indiana Power Company for distribution to cities, towns and communities in the territories where part of the affiliated system is owned by them.

Appellant contends that these quantities of energy that flow from appellant's lines onto the lines of these Northern companies should be eliminated from the calculations in arriving at a percentage for apportionment, and suggests that the percentage then should be 6.63 instead of 3.3 (p. 22 appellant's brief). This view of appellant proceeds on the unreal assumption of fact that appellant company is the independent owner of an independently managed property and that it has current to sell at wholesale and that it in act is wholesaling current to Attica Electric Company and Northern Indiana Power Company; that wholesale service may properly be classified as a class of service to which a separate rate may apply and that the rate which is charged the affiliated companies dare not be higher than it is, else they (as though they were independently owned and managed companies) would get their energy requirements from producers to the north of them, in which case appellant argues its power system property would fall entirely on its customers for support.

If the facts were as appellant's position assumes them to be there would, of course, have to be different treatment of the energy going from its lines onto those of the affiliated companies than the court gave it both in the matter of apportioning power system value to Martinsville use and in the matter of apportioning expenses, particularly

the expense of power cost at the Martinsville substation. But those are not the facts.

The reality is exactly the same as if appellant company, Attica Electric Company and Northern Indiana Power Company were merged into one company and all property now in the names of the three were owned by the remaining company and were operated as one property. In that view the treatment the court gave the whole use of appellant's power system is obviously the only fair treatment permitted under the proofs of this case. The retention of the several corporate entities of the affiliated companies and title to portions of the affiliated system in them is obviously nothing but an inconvenience and bookkeeping expense to the common management and common operation of the whole affiliated system as one property (R. 189), and that undoubtedly is one of the reasons for the petition by these affiliated companies to merge. This petition to merge was pending before the Commission at and after the rate inquiry, and inventories and appraisals pertaining to the merger proceedings were adapted to this rate case (R. 203, 243).

We recount briefly the facts which show the reality to be as stated: First, as to ownership and management. All of the capital stocks and securities of appellant company, Attica Electric Company, Northern Indiana Power Company, and of four other affiliated companies are owned by Central Indiana Power Company (R. 157 and 236); appellant's power system property was planned, constructed and is operated by the common management of said affiliated group for the use of the customers of the affiliated companies as well as for the use of appellant's customers,

and it is operated as a part of the affiliated system of properties for the benefit of the affiliated companies as well as for the benefit of appellant (R. 167); Andrus is the president (R. 183) and chief executive (R. 192) of all, and is responsible (R. 183) for the operation and power supply of each and all of the interconnected companies in the loop shown on Exhibit 1; the affiliated system, consisting of the units of these affiliated companies was conceived as a whole; appellant's lines were designed to coincide with a system comprised of the affiliated lines (R. 186); the properties of the affiliated companies are managed and operated as one property (R. 193); appellant's standby plants are operated for *affiliated system* convenience (R. 191) at times of maximum load on the system and not for the cities where they are located (R. 182). The capital investments made by appellant or any other of the affiliated companies are determined by the same management (R. 192).

Second, as to character of appellant utility. Appellant is a purely distributing company and has no power to sell or exchange (XXX, R. 111). The three standby plants operated for affiliated system convenience at peak times generated only a total of 77,946 K. W. H. during the whole year ended May 31, 1930, in a total annual affiliated system requirement of from 475,000,000 to 500,000,000 K. W. H.

Third, as to the nature of transaction under which current is delivered from appellant's lines to affiliated companies. There is annually twice as much current transmitted onto appellant's lines from Indiana Electric Corporation's lines as is required to satisfy appellant's cus-

tomers in its own territory. Most of the excess goes to affiliated companies to the north (R. 165). The complete figures for several years showing this are found by the Master (R. 103-107). These figures also show that no substantial amount of current comes onto appellant's lines from affiliated lines to the North, and the court found that there is no substantial or necessary use of their power property to appellant in reciprocation for the use made of appellant's power property.

These deliveries from plaintiff's lines to the Northern Companies are not as a result of purchases and sales. They are mere meter readings of current flowing in the common pool and passing the points where appellant's lines leave off and the others begin. Andrus testified as follows: "Current is metered as it leaves one company's property and goes to another. Those readings are washed out and the differential is settled for at one cent. It is a bookkeeping procedure. The one cent price is fixed by witness. There is no written contract in effect between the companies on interchange of current. The interchange goes right on. If the companies make a pull down on plaintiff, the current flows in. There is no order directing the flow of current, and no contract fixing the price of interchanged current" (R. 186); also, "Its lines are simply used as a conduit" (R. 187), and "Constructively, from an operating standpoint, the whole is one system, *but because of the existence of different companies it is necessary to have a figure for bookkeeping purposes*" (R. 189); "If Northern Indiana Power Company and the Dresser plant want to exchange electricity, they do it over plaintiff's transmission lines, and plaintiff gets nothing from either

of the companies for the use of its transmission lines" (R. 187); "The question of what should be charged by the Wabash Valley Electric Company (appellant) to other companies for electricity delivered to them over its lines has never been taken up with the Public Service Commission of Indiana for the purpose of having the rate fixed" (R. 187); "Plaintiff has been paying one cent per kilowatt hour for the current purchased by it since 1924. Until December 1, 1929, plaintiff received one and a quarter cents for current delivered to affiliated companies at the North end of its lines, but since December 1, 1929, it gets exactly the same rate it pays" (R. 188); Andrus "thinks a benefit to plaintiff could be computed to offset the reduction of the price of current delivered by it from one and a quarter cents to one cent if a specific set of conditions were named, but that he cannot name them" (R. 189).

Under the facts as shown by the foregoing recital it is manifest that in determining the actual use made of appellant's power system for affiliated system convenience the realities of the actual, and true nature of, the uses made of the power system to which appellant holds the legal title must be recognized *unobscured by the thin web of corporated fiction.* In reality the entire affiliated power system shown on Exhibit 1 is owned by a single owner (Central Indiana Power Co.), and is *actually* managed and operated as *one* property by *one* management (R. 193), but because of the existence of different companies "it is necessary to have a bookkeeping figure" (R. 189).

The facts recited show that appellant has no current to wholesale to affiliated companies and does in fact sell none to them. Its lines are simply used as conduits, and since

Dec. 1, 1929, the line and transformation losses incident to the use of appellant's lines for affiliated company convenience fall on appellant for current is credited to appellant at the points where it leaves its property at exactly the same 1-cent rate as it is charged for the current where it enters its property (R. 188). In figures this meant that in 1929 there had to come onto appellant's lines 36,560,905 K. W. H. in order to deliver the 35,340,952 K. W. H. that went to Attica Electric Company and to Northern Indiana Power Company (R. 296). Since Dec. 1, 1929, with the one cent charge in effect at both the receiving and delivering ends, appellant's loss for the quantity so handled would be $12,199.53, to say nothing of the loss in the necessary operating expenses, taxes, maintenance, and depreciation relating to the power system so employed. That kind of transaction, occurring solely under the dictates of the common management, can hardly be classed as a wholesaling by appellant of its own current. The same thing is arranged between Indiana Electric Corporation's (an affiliated company) Lenore substation, just south of Indianapolis, and another vast related property in Southern Indiana owned by Interstate Public Service Company. Recently, the 33 K. V. line (Ex. 1) from Lenore to Martinsville was taken down and a 66,000 volt line put in its place, and which now connects at the Martinsville substation with a 66,000 volt line of Interstate running from thence south into the stone districts at Bloomington and Bedford (R. 185), and the current may go either way (R. 209). Interstate's lines and plants are operated in common with the operation of the lines and plants of the affiliated companies (R. 185) Interstate Company and the

affiliated companies are Insull companies (R. 187, 188) and appellant's standby plants are used exclusively for affiliated system convenience.

To regard the use of appellant's power system for affiliated system convenience as a use for wholesaling current it owns for wholesaling purposes is contrary to all of the facts proved. That use is precisely the same use as is made of it for delivering current at substations within appellant's own territory and the whole use is to transmit energy in a common power pool which is in reality owned by a single owner and is actually distributed under a common management with a unified system for the common purpose of serving customers in the whole area in the affiliated system and for the purpose of yielding earnings, through the susidiaries, to Central Indiana Power Company as the real owner of the whole affiliated system.

There is only this difference between the employment of appellant's power system for delivering current at substations in appellant's territory and its employment for transmitting current delivered at substations in the territories immediately north of appellant's territory: to complete the deliveries at substations in those northern territories a further employment of the lines of those affiliated companies is required. But that does not change the soundness of the lower court's position, because to the extent that such further employment of other lines may be required to deliver this current emanating from Dresser to substations further removed from the source than are those in appellant's territory the cost of such additional employment of property should in fairness be borne by the customers served at those more distant substations

rather than by those in appellant's territory that are nearer to the source. In this connection we point out that there is no substantial reciprocal use in the lines of the Northern companies to appellant or its customers (finding 12, R. 166). Thus, during the year ended May 31, 1930, only 1,585,400 K. W. H. came onto appellant's lines (R. 231) from the northern lines as against a total of 35,340,952 K. W. H. going from appellant's lines onto them in the same period (R. 296). And for 1928 none is shown coming down from the north (R. 104). Moreover, what has come down was not needed for appellant's purposes, because in the year ended May 31, 1930, appellant could and did get from Indiana Electric Corporation to the south 84,778,437 K. W. H. (R. 105), of which only 41,032,962 K. W. H. were delivered in appellant's own territory (R. 107), and appellant can continue to get all the current it needs from the Dresser plant (R. 189).

Two arguments are advanced in appellant's behalf against treating the use of its power system for affiliated system convenience on a parity with its use to customers within its territory. These arguments are that appellant should bear the whole burden of its power system (a) because its properties are part and parcel of a vast system put together to justify the Dresser plant and in exchange for the affiliated system use made of its property it gets the benefit of a one cent rate from Indiana Electric Corporation, and (b) if the affiliated use is treated on a parity with the company use the result will be a prohibitive power cost to the northern affiliated companies. Neither of these arguments are valid, and they are not made out of any free will of appellant or in its own or in its cus-

tomers' interests. Indeed, appellant has no will of its own. It is the voice of Central Indiana Power Company, the company to whom Spooner and Merrill rendered their bill for services in this case (R. 203) that advances that argument. Any moral obligation on the part of appellant or of its customers blindly to support an infant industry in such measure as the common management of that industry may dictate has long since become extinguished, and the paternal assurance of general benefits in a great fraternity exceeding any charges being made is hardly enough to prevent searching inquiry for a reasonable basis on which to fix reasonable rates to be charged in Martinsville. The "infant" has become a giant. The affiliated properties which were assembled to justify the Dresser plant with its capacity to manufacture annually 300,000,000 K. W. H. now require from 475,000,000 to 500,000,000 K. W. H. annually (R. 158). Accordingly, a line has been built across the state (Ex. 1) to the plant of Columbia Power Company, with which a contract has been entered into for power at the low rate of 5.5 mills per K. W. H. if taken in large quantities. Not only that, but the same Insull interests that launched the affiliated system, have built just east of the Illinois state line at Hammond the State Line generating plant which is the largest plant built anywhere, and this affiliated system has been connected with that plant (R. 182). Even later than that, these same interests were building a large generating plant at Michigan City, and were connecting the affiliated system to it while the hearing below was in progress (R. 183). Besides, the affiliated system is connected with the large Twin Branch plant at South Bend, and with several other generating plants out-

side the affiliated system territory (R. 182-185). And still other plants are looking for markets for their excess power (R. 263). The enterprise in the electric industry has been such and the construction of large generating plants seeking outlets for power has developed so far that the argument made for appellant that present considerations should be governed by the conditions existing in the early stages of the affiliated system is without force or merit. Even under those conditions the position taken by appellant that the whole burden of the power system property that happens to be owned by appellant should be saddled on the customers in its territory would have been unfair.

There is no point to the contention that the affiliated companies to the north would cease taking power coming over appellant's lines if the affiliated use of appellant's power system would for the purpose of this case be treated on a parity with the company use. What is being done now is not to compute and fix a charge to be paid by the affiliated companies for that current, but it is to determine fairly the fact of what property is employed in rendering service to Martinsville and what its fair value is as a basis upon which to test the rates to be charged customers in Martinsville. It does not follow from the lower court's findings that current delivered to affiliated companies must indeed be charged to them and settled for by them at a higher rate than now. None of the affiliated companies have an independent will and none operate their properties independently. There is no bartering between them. There is actually only one management of all and really only one owner, and their several properties are interconnected and operated as a unit. In reality there is no

more occasion, for the purposes of this case, to consider what the rate is or should be at the boundary lines of the severally owned parcels of the whole affiliated system than there would be to consider what are or should be such rates at those points if the several corporate entities were wiped out. No matter what is done here as to Martinsville rates, the same flow of power will obviously occur throughout the affiliated system under the dictates of the common management as now occurs. And to the real owner that makes no difference. But if the effect of the lower court's findings were to increase the charge at these boundary lines, that would settle nothing here, for at all events a property built in part for outside uses cannot expect to be compensated on its whole value from only inside uses when the outside uses stop.

Appellant furnished no specific data or facts from which the court below could in fairness to Martinsville have treated the affiliated use of appellant's power system as a different use from that made of it within appellant's territory. The court's findings on this subject are bottomed on the realities shown by the facts proved, and cannot be overthrown by the unreal and general criticisms offered for appellant.

The percentage of 3.3 found by the court and applied to power system value to get the fair value of power system employed for Martinsville service expressly rests on the actual uses of the power system as found by the court (findings, 12, 13, R. 164-168). This percentage results from a consideration of the ratio of deliveries of current at the Martinsville substation for Martinsville use to total deliveries at all of appellant's substations, and of the ratio

of Martinsville peak demand to peak demand on appellant's entire system. Aside from appellant's objection, already noted, to the inclusion of total deliveries and of total system peak demand involving the whole use made of power system on the same basis, appellant also objects to the treatment of the intra-company use of power system on the basis of attributing to Martinsville a use that is average to all substations in appellant's territory. While there was general testimony to the effect that there is a difference in the cost of rendering service from power system at different substations due to difference in load factors (R. 188), no data as to varying load factors was furnished from which a different than average use could be computed for Martinsville. Moreover, in the computation made in appellant's exhibit 22 (R. 300) where its auditor figured out a "gateway" rate applied to Martinsville (R. 293) and which rate included depreciation and return on power system, appellant itself treated all gateways, including Martinsville, as average. And its witness, Sittinger, testified that:

> I should think that within the Wabash Valley property the same gateway price to all the gateways of the different towns and to each and all of the power customers, like coal mines and gravel pits, would be equitable (R. 227).

Under the state of the proof the court could not treat power system use for Martinsville on any basis other than on an average basis, and appellant's general criticism can be of no avail in the absence of specific facts proved from which a more accurate determination of such use could be made.

We find no objection in appellant's brief to the apportionments of expenses of operation either as to power system or as to Martinsville, and no such objection could well be made, for the apportionments used are those which appear in appellant's own accounts as kept by it.

Appellant objects to the use of $.0133 per K. W. H. as the actual power cost at Martinsville on the ground that it is an average cost. Here again appellant wholly failed to prove any specific facts from which a different than average cost could be computed. This cost does not include depreciation and return on power system, but is the average K. W. H. cost of all energy delivered by appellant in 1929 as carried on appellant's own books (R. 127), and we again call attention here to the testimony of Sittinger hereinbefore quoted. It is true that this rate for power cost includes the deliveries to affiliated companies in the same way as they were included in determining power system use for Martinsville, but what we have said in favor of such inclusion and against exclusion in that connection applies here with the same force. Appellant's criticism of the use of this average rate of cost for power is invalid in the absence of proven data from which a different cost could fairly be computed. The cases cited at page 67 of appellant's brief in which certain averaging methods were used to support findings of cost to haul particular articles of freight very obviously fail to support appellant's objection to the use of an average K. W. H. power cost in this case.

The Commission had found the old rates charged by appellant to be excessive (R. 47) and fixed the new rates at issue. The burden was on appellant to prove facts in

support of its charge of confiscation. It failed to prove data upon which more accurate findings could fairly be made as to property employed or as to cost of power used in rendering service at Martinsville, and its contentions now that the findings made on those points are not as accurate as they should be are out of order.

III.

(Answering III, p. 76, appellant's brief.)

Fair Value Found.

The fair values found by the court for the Martinsville local property and for power system property include all items properly entering into such valuations. They rest on a fair consideration of all of the appraisals and testimony thereon. At pages 31-35, this brief, the facts are set out showing the considerations on which these findings of value are based. These values are not open to just criticism. Certainly, appellant's brief does not from clear and convincing proof show them to be incorrect, and hence they must stand. United Gas Co. v. Public Service Com., 278 U. S. 300.

In view of the fact that appellant's capital was, and is, furnished by Central Indiana Power Company (R. 236) there was no error in excluding from the values found the item for cost of financing. New York Tel. Co. v. Prendergast, 36 Fed. (2d) 54, 64; Galveston Elec. Co. v. Galveston, 258 U. S. 388.

Appellant's objection to value found goes to the Master's finding (R. 130, 131) of value for the entire property. For argument, it might be conceded that the value of the

entire property is as high as appellant contends and nothing material would thereby be conceded in this case. Such a value could only serve as a basis upon which to find total earnings on the entire property, and we have already shown that whatever the total earnings may be, the inquiry still remains whether the earnings from the particular rates at issue are sufficient to fairly compensate that property which is actually employed in rendering the service to which the particular rates apply. But appellees believe that so far as the fair value of the entire property is at all to be considered it should be considered as found by the Master. As reasons for this see pages 46-47, this brief.

IV.

(Answering IV, p. 82, appellant's brief.)

Rate Case Expenses.

The Commission allowed a total of $4,000 for rate case expenses, to be amortized against Martinsville revenues at the rate of not more than $400 per annum. There is no proof that appellant sought greater allowance from the Commission or that evidence of any greater expenditure than that was presented to the Commission. Appellant simply proved in this case that it has incurred and charged to the date of the hearing below a total of more than $60,000 of expenses for engineering, auditing and attorney services, etc. There is no charge in the complaint that the $4,000 allowance by the Commission is unreasonable. No one has sought to prevent appellant from expending any moneys it may wish to expend. But

appellant has failed to furnish data or facts from which a finding could be made either as to the necessity or value of expenses incurred, and the Master so found (R. 114-115). On the contrary, it is clear that much of the expense incurred relates to unnecessary appraisals of fifty local distribution systems, and all appraisals of the power system property have value apart from their use in this case. There is no proof showing that the whole charge should be made against only Martinsville. By Acts 1927, p. 495, the Commission was directed to exclude unnecessary or excessive expenses from consideration in determining and fixing the rates. The presumption is that its order allowing $4,000 is reasonable, and appellant has not proven it otherwise.

Moreover, a $60,000 rate case expense against Martinsville alone is an impossible thought. That would mean that this small community would be penalized at the rate of over $6,000 a year for ten years for having dared to provoke an inquiry into the reasonableness of the rates charged there. There could be no more practical way to prevent rate regulation than to allow such a charge as that in a test of the reasonableness of the rates fixed. We are certain that the court below took the right view in confirming the item of rate case expense as allowed by the Commission. The cases cited by appellant at pages 85 and 86 do not sustain its impossible position of wanting these rates tested by including in Martinsville annual operating expenses a tenth part of more than $60,000, as its exhibit 22 does (R. 293).

V.

(Answering V, p. 87, Appellant's Brief.)

Rate of Return.

What is a fair rate of return in this case depends on the relevant facts proved. Smith v. Illinois Bell Tel. Co. The Commission had found a return of 7% adequate. The only testimony in the record on rate of return was by the engineers on both sides—appellant's engineers being of the opinion that 8% was required, and appellees' being of the opinion that 7% was sufficient. The court found 7% to be fair. This finding is supported not only by the testimony of appellees' witnesses but also by that of appellant's engineer Spooner coupled with other proved facts. Spooner testified that:

> To take care of the return on bonds, debt discounts, borrowed money and stock dividends, it is necessary to have a rate return of 7%. In order to accumulate a surplus, and make it easier to finance the Company, the rate of return should be not less than 8%.

The facts show appellant had an accumulated surplus of $1,257,884.64 on December 31, 1929, against a surplus of $1,074,739.71 on January 1st of that year (R. 313), and that it is financed by Central Indiana Power Company (R. 236).

VI.

(Answering VI, p. 90, appellant's brief).

Rates Sufficient to Yield Fair Return.

The tests made by the court of the new rates show they would have yielded a fair return of more than 10%

for the year ended May 31, 1930, on the May 1, 1930, fair value of the property employed, and a return of 11% for the year 1929 on the same value, and that on the February 1, 1929, fair value they would have yielded an even greater than a 11% return (R. 168, 169). The finding (R. 161) on operating revenues the new rates would yield is not challenged.

The comparisons made at page 93 of appellant's brief between its own and the court's computations is worthless for the reason that appellant confused its own method with that of the court. The court computed power cost at a rate which covered all costs except depreciation and return on power system but which items were computed on the power system value apportioned to Martinsville (R. 168, also R. 123-125). But in appellant's computation (p. 92) power is computed at a rate which includes depreciation and return on power system (R. 300), and appellant's $11,516.60 figure for annual depreciation again includes a 4% charge on its apportionment of power system to Martinsville.

By exhibit 22 appellant sought to show that the new rates would produce an operating deficit of $10,621.89 (R. 293) for the year ended May 31, 1930. That would be serious if true, but it isn't.

In the first place, the power cost is computed at a K. W. H. charge of $.024163. This charge is computed (R. 294) by charging against revenues collected only from appellant's own customers all power system expenses, taxes, and 4% for annual depreciation and 8% for return (instead of 7%) on the Spooner and Merrill appraisal (R. 294). That appraisal is $3,637,650 (R. 294)

against the fair value of $3,066,395 (R. 164). The current delivered to affiliated companies is taken out at the former 1¼ cent rate that had been fixed by Andrus up to December 1, 1929 (R. 294). Such a computation for power cost at Martinsville at the rate of $.024163 per K. W. H. is obviously unfair. An interesting fact in this connection is that in that same year a comparable quantity to a comparable city (Tipton) was sold at $.0162 per K. W. H. (R. 320) by Northern Indiana Power Company out of the power pool replenished from appellant's lines. Next, a 4% charge for depreciation is computed on the Spooner and Merrill appraisal of depreciable local property ($113,376, R. 294, 293) which appraisal is higher than the fair value of that depreciable property as found by the court ($84,589, R. 163). And included in appellant's computation as a Martinsville operating expenses is the sum of $6,235.98 "annual amortization charge for this rate case expense" (R. 293) instead of $400 as fixed by the Commission. The charge included by appellant for rate case expense would itself make a 7% return on nearly $90,000.

In its exhibit 28 appellant came down a notch by attempting to allocate part of the Clinton-Lafayette line, over which most of the current goes to the northern affiliated companies, out of its power system, and then followed the plan of exhibit 22. The Martinsville deficit thus computed by appellant is $7,420.80 under the new rates (R. 240). In exhibit 28 annual depreciation and 8% return are again computed on appraisals as in the case of exhibit 22, and the $6,255.98 rate case expense item is also included.

The attempted allocation of the Clinton-Lafayette line to affiliated system use does not allocate out the whole affiliated system use of appellant's power system property. It leaves in the three standby plants which are operated exclusively for affiliated system use The mere physical elements of these standby plants are valued at $309,388 by the court and are included in the power system value (R. 163). It leaves in also all of the 66,000 volt line built from Lenore to Martinsville to contact there with Interstate's 66,000 volt line. Moreover, the whole of appellant's power system was constructed with reference to the whole affiliated power system. Exhibit 28 is not reliable under these circumstances, and the Master so found (R. 113).

The Master computed a fair gateway rate of $.018 per K. W. H., which includes depreciation and return on the fair value of power system property as found by the court, and he then computed power cost at Martinsville at the gateway rate so found in tests made by him of the new rates on the basis of the fair value found by the court for the Martinsville property. The new rates so tested show a yield of more than 7% on the fair value of the Martinsville local property for both periods to which the court's tests apply (R. 125-130).

Moreover, the Master found (R. 126) that if provision is made first for all Martinsville operating expenses, except power cost, 4% annual depreciation and 7% return on the fair value of the Martinsville local property, there would remain out of the 1929 operating revenues which the new rates would have yielded the sum of $51,305.72 available for power cost so that the power could

be charged at a gateway rate of $.02021 per K. W. H. Such a gateway charge is close to the one computed in Exhibit 28 and which is based even on an 8% return on Spooner and Merrill's appraisal figure (R. 300).

VII.

(Answer to VIII, p. 96, appellant's brief).

Rates Compensatory Since Effective Date.

It follows from what has been said that appellant has failed to sustain its bill. On the contrary, it appears, as found by the court (Finding 16, R. 169), that the rates at issue have at all times since their effective date been sufficient to earn a fair return on the fair value of the property employed in rendering service to the public in Martinsville.

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes Cited.

Sec. 57 of Shively-Spencer Utility Commission Act, is set out in Court's finding 6, pp. 12, 13, this brief.

> ... The Commission shall determine, and by order fix, just and reasonable rates ... to be imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable....

Vol. 3, Sec. 12742, Burns' Ann. Ind. Stat. 1926.

> Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit, subject to the provisions of this act, and subject to the provision..., that the municipality in which the major part of its property is situated may purchase the property of such public utility actually used and useful for the convenience of the public... If this act should be repealed * * * such utility shall be reinstated in the possession and enjoyment of the license, permit or franchise surrendered by such utility at the time of the issuance of the indeterminate franchise, permit, or grant.

Sec. 12773, ibid.

> Any public utility operating under an existing license, permit or franchise, shall upon filing,... a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof, an indeter-

minate permit * * * and such public utility shall hold such permit under all the terms, conditions and limitations of said act...

Sec. 12774, ibid.

...such item or items (of expenses)...as the Commission may deem unnecessary or excessive, shall not be taken into consideration in determining and fixing the rates which such utility is permitted to charge for the service which it renders.

Vol. 4, Sec. 12722, Burns' Ann. Ind. Stat. 1929, Supp.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 128

WABASH VALLEY ELECTRIC COMPANY,
Appellant,

vs.

RALPH M. YOUNG,
(SUBSTITUTED FOR FRANK T. SINGLETON) ET ALS.,
Appellees.

PETITION OF THE APPELLANT FOR A REHEARING.

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